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ADMINISTRATION'S CHANGE IN FEDERAL POLICY REGARDING THE TAX STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

HEARING

BEFORE THE

COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 4, 1982

Serial 97–39

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
91-531 O WASHINGTON : 1982

H781-15

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ADMINISTRATION'S CHANGE IN FEDERAL POLICY REGARDING THE TAX STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

THURSDAY, FEBRUARY 4, 1982

House of Representatives,
Committee on Ways and Means,
Washington, D.C.

The committee met at 10 a.m., pursuant to notice, in room 1100, Longworth House Office Building, Hon. Dan Rostenkowski (chairman of the committee) presiding.

Chairman Rostenkowski. Today's hearing has been called as part of the oversight responsibility of the Committee on Ways and Means with respect to the administration of the Federal tax laws. Much has been said in recent weeks about the administration's reversal of a longstanding policy denying tax-exempt status to racially discriminatory private schools. Many of us in Congress are deeply disturbed by the implications of this decision.

The purpose of this hearing is to determine how and why the decision was made. The committee will be particularly interested in exploring the legal justification for the administration's change in policy.

In view of the substantial number of court decisions including decisions of the United States Supreme Court interpreting the Constitution, existing civil rights laws and other Federal statutes, the burden is clearly on the administration's witnesses who will appear before us today to convince this committee and the American public that their decision is justified and that legislation is in fact necessary.

In preparation for these hearings, I requested documents, briefs and other legal memoranda from the Treasury Department, the Justice Department, and the Internal Revenue Service which are relevant to this issue.

Many of the questions that will be raised by members today are provoked by issues presented in these materials. This committee is principally concerned with the administration's decisionmaking process, and the considerations, whether legal or philosophical or political, that may have been given in reversing this longstanding policy against racial discrimination in private education.

Second, the committee is equally concerned with the legal justification and the legal consequences of the administration's policy.

We will first hear from a panel of legal scholars, experts who have studied this issue from the constitutional and legal perspective. Before we hear the administration's witnesses we need to establish a framework for assessing the legal basis for their actions and the consequences of their decision.

Second, we will receive testimony from former officials of the Internal Revenue Service and the Tax Division of the Department of Justice, from past Democratic and Republican administrations. Then, we will hear the administration officials directly involved in the decisionmaking process.

We will conclude the hearings with the Commissioner of Internal Revenue Service, who will be asked to address questions on the effect of the administration's decisions on tax administration. Since this is an oversight hearing with a specific inquiry at issue, I will ask all witnesses to briefly summarize their statements, so that most of their time can be devoted to questions from members of the committee.

At this time I would like to ask unanimous consent that the press release notifying the public of this hearing and the documents that were made available to this committee from the administration be made part of the record. Is there objection?

The Chair hears none.

[See appendix beginning at p. 419 for the documents referred to. The press release announcing the hearing follows:]

[Press release of Tuesday, Jan. 12, 1982]

HON. DAN ROSTENKOWSKI (D., ILL.), CHAIRMAN, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES HEARINGS ON THE ADMINISTRATION'S CHANGE IN FEDERAL POLICY REGARDING THE TAX STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

Hon. Dan Rostenkowski (D., Illinois), Chairman of the Committee on Ways and Means, U.S. House of Representatives, announced today that the Committee on Ways and Means will hold hearings, beginning Thursday, February 4, 1982, to review the Administration's recently announced decision to reverse the long-standing interpretation of federal law requiring the denial of tax-exempt status to racially discriminatory private schools and to ask the Supreme Court to vacate two lower court decisions denying the tax-exempt status of Bob Jones University and Goldsboro Christian Schools.

At the February 4, 1982, hearing the Committee will hear testimony from Administration witnesses representing the Justice Department, the Treasury Department and the Internal Revenue Service and from invited witnesses. The hearing will begin at 10 a.m. in 1100 Longworth House Office Building.

In announcing this hearing, Chairman Rostenkowski stated, "This action by the Administration has major tax and public policy implications. The Administration apparently is now taking the position that a private school is entitled to tax-exempt status whether or not it follows racially discriminatory practices. This action is an attempt to reverse numerous court decisions, including Supreme Court decisions, based on long-standing principles regarding the conduct of charitable organizations and well-defined public policies against racial discrimination. While all of us in Congress are aware of the difficulties involved in determining whether racial discrimination exists in individual cases, the Committee on Ways and Means has a responsibility to determine what the Administration's tax policy is in regard to discriminatory private schools generally and what the consequences of such policies will be in terms of a uniform standard for tax administration nationwide. In addition, the Committee has a responsibility to examine whether the Administration's action is consistent with the law as enacted by the Congress and as interpreted by the courts."

BACKGROUND

The policy that private schools may not racially discriminate and maintain their tax-exempt status was first established in *Green* v. *Connally*. This policy has since been upheld in subsequent court decisions. In the *Green* case, the court found that it was not consistent with Congressional intent to allow tax-exempt status for activities that were contrary to public policy enacted in federal statutes such as Section 601 of the Civil Rights Act of 1964.

To effectuate this policy regarding tax exemptions for private schools, the Internal Revenue Service published its first revenue ruling on the issue in 1971 and later provided more specific guidance in Revenue Procedure 75-50. However, in 1976, the adequacy of IRS's procedures for determining whether private schools discriminate in practice was challenged by the Green plaintiffs. In reaction to this suit, the IRS proposed a new revenue procedure and issued it for public comment in August, 1978, and again, in a revised form in February of 1979. However, the IRS has been prohibited from implementing new procedures as a result of a specific legislative rider added to Treasury Department appropriation bills since 1979.

In October, 1981, the Supreme Court granted petitions for certiorari in the cases of Bob Jones University and Goldsboro Christian Schools. In both these cases, the IRS had denied tax-exempt status to these private schools on the grounds that these schools practiced racial discrimination contrary to U.S. public policy. In both cases, the action by the IRS was upheld on appeal by the Fourth Circuit Court of Appeals. In September, the Administration acquiesced in the granting of certiorari by the Supreme Court in both these cases. On January 8, 1982, the Administration filed a motion in the Supreme Court asking the Court to vacate the Fourth Circuit's judgments in both these cases. In addition, the Treasury Department has initiated steps to grant Bob Jones University and Goldsboro Christian Schools tax-exempt status under section 501(c)(3) of the Internal Revenue Code, to refund to both schools Federal social security and unemployment taxes in dispute, and to revoke revenue rulings relied upon to deny these schools tax-exempt status.

Chairman ROSTENKOWSKI. Mr. Conable is recognized.

Mr. CONABLE. Mr. Chairman, thank you for recognizing me.

The administration's January 8 initiative with regard to tax-exempt status for racially discriminatory schools has forced this committee to focus on this exceedingly difficult issue. I can't say that any of us relish dealing with this, but now that it has been thrust so squarely before us we have no choice but to consider it thoughtfully and carefully, and as dispassionately as possible.

Judging from our past actions, it will not be easy to reach a conclusion as to the best course of action. In 1979 our Subcommittee on Oversight held lengthy hearings on proposed IRS revenue procedure. A staff report was issued but the committee refrained from any further action.

Twice we have voted on the floor of the House on riders to the Treasury Department appropriations bills to prevent the enforcement of any rule, policy, procedure, guideline, regulation, standard, court order or measure issued after August 22, 1978, which would affect schools' tax-exempt status.

As recently as last July 30, 28 of the 35 members of this committee supported that rider, an indication perhaps of our collective reluctance to move forward on this knotty issue until we were more sure of our ground. I do not pretend the issues in this vote were identical to those before us today. I mention it to demonstrate how difficult the problem is.

At the request of the administration, I have introduced their proposed legislation so that we can have it before us as we consider an apppropriate course of action. I hope the discussion this morning will be constructive and enlightening. I hope that any actions we decide to take will be arrived at dispassionately and that the results of our deliberations will make a strong appeal both to justice and to logic.

Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. Mr. Rangel is recognized.

Mr. RANGEL. Mr. Chairman, I want to commend you for your prompt response to the administration's attempt to reverse our Nation's longstanding national public policy of eliminating racial discrimination in educational institutions.

We do recognize that this follows a policy of changing the attitudes that we have had and reversing the advances that have been made in the area of civil rights. I would like to point out, Mr. Chairman, that I have had the opportunity to hear some of the testimony, read a lot of it, and to discuss the matters that we will be looking into today with staff members. I think it is going to become abundantly clear at this hearing that there is a wide conflict between the facts as written and some of the testimony that has been given.

Because it is my considered opinion that the issues that are coming before this committee go far beyond the legislation that has been introduced at the suggestion of the President, I hope that this committee would be receptive to the idea, if it does arise, that the witnesses for the administration, that their testimony be taken under oath. It appears to me that if in fact the record proves that a political solution to a problem was reached at the expense of the Constitution, the courts and the people of the United States, that this committee has the responsibility to provide a record in case this matter is referred to the Judiciary Committee.

Thank you.

Chairman ROSTENKOWSKI. The Chair would also ask unanimous consent that Mr. Hance, who is unable to attend the meeting, have an opportunity to include a statement for the record.

[The prepared statement follows:]

STATEMENT OF HON. KENT HANCE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

I am pleased that the Ways and Means Committee is holding prompt and extensive hearings on the issue of tax exempt status of private schools. I was dismayed, as most people were, with the sudden reversal in national policy taken by the Administration last month on this issue—a reversal on a policy, I might add, which originated with President Nixon and which has been enforced by both Democratic and Republican Presidents since then.

There is little if any question in my mind and in the minds of legal scholars that the Administration has the authority to deny tax exempt status to schools with demonstrated discriminatory practices. Both the 1964 Civil Rights Act and case law over the past ten years refute the Administration's policy reversal in this regard.

I am not convinced by the Administration's assertion that new legislation is necessary in order to enforce what has been public policy for a decade. I believe, instead, that the Administration should concentrate on more sensible enforcement of its existing authority to deny tax exempt status to private schools that discriminate. In the past, Congress has prevented the Internal Revenue Service from issuing regulations on tax exempt status which were both arbitrary and burdensome on private educational institutions. I believe, however, that a vast majority of Members of Congress is opposed to the complete policy reversal taken by the Administration early last month.

I am totally opposed to racial discrimination and believe that there are situations in which an administration has the responsibility and even the duty to deny tax exempt status to racially discriminatory educational institutions. A tax exemption constitutes a financial subsidy from all taxpayers of all races. Any school enjoying tax exempt status, then, should maintain an admissions policy open to individuals of all races and national origins.

It is my hope that the Administration will admit its mistake and enforce existing law in the area of tax exempt status for private schools. I also hope that this hearing will provide some insight into what has become a very controversial issue.

Chairman ROSTENKOWSKI. Professor Tribe, Professor Rosenthal, Professor Sanders, welcome to the committee. Gentlemen, we are pleased that you have joined us this morning to give us the benefit of your interpretation. We will take your testimony, and as I pointed out in my opening statement, I would like very much for you to summarize your testimony so that we can have a free exchange between you and the members of the Ways and Means Committee.

Professor Tribe, if you will begin by identifying yourself and present your testimony, the committee is ready to proceed.

STATEMENT OF LAURENCE H. TRIBE, PROFESSOR OF CONSTITUTIONAL LAW, HARVARD UNIVERSITY

Mr. TRIBE. Thank you very much, Mr. Chairman and members of the committee. I am Laurence Tribe, professor of constitutional law at Harvard. I am honored by your invitation that I join you this morning to testify on this truly crucial matter. I hope I can be of help, and I will try to be as brief as I can.

I might call to the committee's attention the fact that, in addition to the prepared statement that was released yesterday, there are two brief supplementary statements, one dealing with the difficulties of a concurrent resolution as a possible way out of the impasse; the other, suggesting that, if there is to be such a resolution, it really ought to be one censuring the administration. The statement explains the theory.

Let me move to the substance. First of all, I think we should all recognize that there is no basis whatever for the administration's claim that the antidiscrimination requirement for tax exemption and tax deduction under sections 501(c)(3) and 170(c)(2) is something that the Internal Revenue Service simply made up in an exercise of "administrative fiat", as the President described it.

According to Deputy Attorney General Schmults, the origin of the current practice was a desire by President Nixon to win popular approval. Nothing could be further from the truth. The truth is that the decade-old antidiscrimination requirement, as Assistant Attorney General Reynolds conceded in his draft brief of January 29, was the result of one thing, and one thing only: a lawsuit against the Internal Revenue Service, a lawsuit that ended in a Federal court ruling that was affirmed by the U.S. Supreme Court in 1971.

The case is widely known as *Green* v. *Connally*. It was affirmed under the name of *Coit* v. *Green*.

Now, that ruling, quite simply, says on a nationwide basis, as a matter of declaring the law, that the Internal Revenue Service cannot grant exemptions and deductions for racially discriminatory private schools. The injunctive part of the ruling was limited to Mississippi simply because the parties were from Mississippi. At no point has the administration sought to explain how it intends to proceed without directly defying that still-binding decree entered in 1971—exactly how it plans to alter the policies that have been in force for the last decade.

Second, the 1971 decision in that case, in the *Green* case, was no aberration. It is absurd to say, as the administration has, that there is "no basis in law" for what was done, because every appellate court that has considered the matter has reached exactly the same conclusion, that tax exemptions are already impermissible as a matter of statutory law and perhaps also of constitutional law, for discriminatory schools.

Third, the evidence is overwhelming that Congress, in dealing with the problem of racially discriminatory social clubs in 1976 and in its appropriations riders in 1979, accepted as its baseline the ineligibility of segregated schools for the special tax benefits that we are talking about here. Perhaps that is one reason so many Members of this body are a bit impatient with the suggestion that new legislation is needed.

The fact is that Congress has spoken several times, always consistent with the Nation's commitment to racial equality.

Fourth, I think it is crucial to recognize that what is at stake here is indeed the allocation of special tax benefits. We are not discussing, contrary to what the Department of Justice memorandums seem to assume, the use of the Internal Revenue Code to penalize unlawful or antisocial conduct by departing, on moral grounds, from some neutral way of measuring a taxpayer's net income. Most of the Government's arguments, so far as I can understand them, are thus aimed at a complete straw man.

It is as though the IRS had proposed, or the courts had approved, doubling the tax rate on people who discriminate against minorities, or denying tax deductions for the cost of business equipment unless it is purchased from a minority company.

Now, policies of that sort would involve bending a system that is designed to tax net income into a system for policing race relations. That is occasionally done without any express statutory mandate, but that is a rare practice, and it is not the kind of practice that is involved in the situation before this committee.

The Internal Revenue Service policies at issue before this committee, I think it must be made clearer than it usually has been, entail no bending at all. In fact, at stake here is a court ordered prohibition against twisting the tax system so as to favor race discrimination in private schools, by including the racially discriminatory activities of those schools in the very selective list of enterprises that are deemed to benefit the public enough to warrant sheltering their income from the usual taxes under section 501(c)(3), and to warrant matching the private money that they receive with public revenues in the form of tax deductions under section 170(c)(3).

Once the issue is seen in this light, it is much easier to understand why all of the appellate courts to consider it have agreed on this issue, and why a legal system committed to racial equality—in the Civil Rights Acts and in the Constitution itself—must be read to forbid making racist schools eligible for special tax benefits.

Fifth, only a racially discriminatory double standard, which I do not believe either the Congress or the administration could in good conscience enforce, would tell black schoolchildren and their parents, after they have succeeded in convincing the Treasury and the courts that the income tax system may not legally be used to reward racism in education, that they have still got to jump over one more hurdle. They are out of luck unless they get Congress to write that principle expressly into the law, either by a statute or by a concurrent resolution.

There is no other group in our society that has been forced to leap over that extra hurdle. When other groups win victories in the administrative process that are then ratified uniformly over a decade by the courts, they can usually rest confident in the knowledge that they have succeeded. But this group is told: "No, you haven't made it until you get a new statute or resolution passed."

If we did impose that kind of rule across the board, the whole system would collapse. It would grind to a halt. Congress could not possibly read, much less write into law, more than a tiny fraction of the perfectly reasonable regulations and practices that agencies adopt, either on their own or under the impetus of judicial review, to fill in the gaps in congressional statutes. So, clearly, there is a dilemma here. If the administration really means that agencies are not to fill in such gaps without explicit direction from this body, then they propose to bring the Government of the United States to a halt. If they do not mean that, then they are proposing a racist double standard.

Sixth, the alleged need for further legislative action, either by a statute or by a resolution, to ratify or to approve the decade-old antidiscrimination requirement in this area bears all the hallmarks, I must say, of a politically inspired afterthought, a bailout borne of a backlash the administration simply did not expect.

No inside information is needed to reach that conclusion. The conclusion follows inescapably from the very fact that not one respectable legal argument has been offered, and I can't imagine one, for the Justice Department's strategy that simultaneously produced the alleged need for Congress suddenly to act, but moved to prevent the one thing that could have served as a legal check on whether the need was real or imagined—namely, a Supreme Court ruling in the *Bob Jones* and *Goldsboro* cases.

The Department of Justice, we must remember, had itself encouraged the Supreme Court, only last fall, to grant certiorari and to hear these cases for the specific purpose of affirming the Fourth Circuit, thus removing the doubts that some still had, and encouraging compliance with the antidiscrimination rules of the IRS. That was their position last fall. Nothing has happened since, and nothing the Department of Justice has said even remotely explains, even if they are right about the law, why it is that the Supreme Court should not be allowed to resolve the issue one way or the other—in accord with law.

If the Department of Justice is truly convinced, despite the conclusions they reached last fall, and despite the conclusions that every appellate court has reached, that current law doesn't support the antidiscrimination requirement, then obviously they ought to argue that view to the Supreme Court rather than hiding it in their pockets and trying to pull the case out from under the Court.

If the Court agrees with them, which I doubt it would, then we would know that the law has got to be changed if we want to deny racially discriminatory schools special tax benefits. But if, as I suspect—and as some in the administration undoubtedly fear—the Supreme Court rules that current law does, after all, support the IRS, as every appellate court has said, then the case for having to pass a new law will evaporate.

Under our system of law, I think one should remind the administration is the province and duty of the judiciary to decide those questions—not of the executive branch acting unilaterally, particularly when it is complaining of executive fiat.

Now maneuvering the Supreme Court in this case into deciding nothing, resolving no doubts—by trying to make the controversy disappear—attempting to make the case seem moot—must have been a rather tempting strategy for the administration, an administration that, as you all know, is considering removing judicial jurisdiction over various subjects when there is fear that we will not like what the Court says if it exercises such jurisdiction.

But there is a big difference between the bills that would remove the jurisdiction of the courts and what this administration is trying to do. Those bills have to be passed by the Congress, and Congress just might not like the idea.

Indeed, a few days ago the Conference of State Chief Justices unanimously resolved that those jurisdiction-limiting bills were profoundly unwise. But what the administration evidently proposes to do when it fears what the Court might rule is simply to bypass Congress—by pulling cases out of the Supreme Court by mutual agreement among the parties. Of course, the parties in this case do not happen to include the black schoolchildren and their parents. Indeed, the administration says that these groups don't have standing to enter a case of this kind. So what the Department of Justice did in its sudden aboutface, I think it is important to recognize, is go to the Supreme Court on January 8 and say: "Surprise, there is no longer a case here!"

It is a popular technique with this administration. They tried it with the Equal Rights Amendment and almost succeeded.

It turns out it is not so easy, however, because under the Supreme Court's standards a case is not moot—that is, the controversy doesn't go away just because there is a nice, sweet deal between the Government and the parties. The Department of Justice had the task of convincing the Supreme Court of the United States, in order to get that Court to throw the case out, that the Government was not just inviting two schools, *Bob Jones University* and *Goldsboro,* to take a private dip into the U.S. Treasury.

And that's my eighth point: the Court had to be convinced that the Government was actually revoking the revenue rulings that had blocked those two schools and others like them from getting and keeping tax-exempt status. So it was crucial for the Court to be persuaded that there was a change, a real policy change reflected in the removal of the underlying antidiscrimination revenue rulings, and that is exactly what the Court was told on January 8 of this year.

Now as we all know, as soon as that happened, there was an enormous firestorm of reaction, seemingly unanticipated by the administration, which led the President and the Treasury Department to take a crucial step on January 18, informing both the Speaker of the House of Representatives and the President of the Senate that new legislation would be introduced, and that, until the new legislation was acted upon, racially discriminatory schools other than *Bob Jones* and *Goldsboro* were in fact not going to be given tax benefits after all. Their applications for relief thus would not be acted upon, so they couldn't take advantage of the Government's January 8 posture until Congress had moved on the administration's proposed legislation. Of course, once Congress acted, then these other schools would be out in the cold again, because the proposed legislation would, if passed, deny them the tax benefits they sought. Now there is a deep question here: How could the administration possibly deliver on that promise, made on January 18 to the Speaker of the House and to the President of the Senate?

My ninth point: The only way the administration could really deliver on its January 18 promise to the Congress was by abrogating its January 8 promise to the Supreme Court.

The latter promise, you will remember, was this: We are getting rid of these revenue rulings. They are in the shredder right now, January 8. We have commenced the process of revoking them.

But if they were being revoked as of January 8, then where in the world would the Internal Revenue Service get the authority to do what the President promised the Congress on January 18 it would do—namely, put all applications by other discriminatory private schools in deep freeze until Congress acts?

Apparently it is their belief—and I think it might be useful to pursue this issue with the administration—that there is a statutory rule which allows the Internal Revenue Service to wait a fixed number of months while processing requests for tax exemption. But I think it is rather obvious that this provision does not authorize a refusal to process requests at all, putting them into a kind of legal purgatory until a new act of Congress is passed. And, in any case, Congress might not act at all within the specified number of months. In that event, the Internal Revenue Service would have to start granting exemptions—since the revenue rulings against discrimination would have been repealed.

What this means, ultimately, is that the Government has been profoundly deceptive in its dealings with Congress. It seems plain that the President's official statement of January 18, if it is to be believed, means that the revenue rulings in question cannot be revoked after all, and that the Supreme Court was thus misinformed.

Now it is not a light matter to misinform the Supreme Court of the United States on an issue that goes crucially to its jurisdiction, an issue that could decide the question of mootness. One might have expected the Department of Justice to "fess up," to tell the Supreme Court that things were not as they seemed after January 18. But in fact, not a word was said. Hence my ninth point: Whatever ultimately occurs, the court was seriously misled as it proceeded at its January 22 conference, to discuss *Bob Jones* and *Goldsboro*.

Why did the Department of Justice leave the Supreme Court with the false impression that the whole practice of denying tax-exempt status to segregationist schools was being dropped? Was it a careless oversight? If you'd believe that, you'd believe anything.

I put the question myself to the Solicitor General's Office yesterday afternoon, and I was told that I couldn't receive an official answer, but I was assured that the reason certainly "isn't that we did not consider filing something in the Supreme Court." I was told by the Office of the Solicitor General that "a determination was made that we should not file anything."

Now I would hope that Congress pursues the question of where the Justice Department thinks it gets the authority to determine that it should mislead the Supreme Court. Evidently it would have been too embarrassed to tell the plain truth—the plain truth that no longer could the case so easily be mooted.

Point 10: On January 25, in the Federal district court here in Washington, where proceedings in the reopened *Green* case have been stayed at the Justice Department's request since January 6, the Department of Justice filed papers to let the district court know what the President and the Treasury had said on January 18. But between January 25 and the release of the prepared statement that I submitted to this committee yesterday, 9 more days had passed without a word of retraction or correction in the Supreme Court of the United States. During all this time, the Court, among other things, was in a position to be deliberating officially about the *Bob Jones* and *Goldsboro* cases. The cases were on their conference agenda for Friday, January 22. It would be wonderful to have been a fly on the wall in the Solicitor General's Office on the preceding day when they must have been trying to figure out what they could do to avoid having the Court proceed the next day. Just simply telling the truth was evidently much too complicated.

Now if the Department of Justice should finally, today or soon thereafer, file something in the Supreme Court—and I have reason to believe that sometime this morning, having seen the statement that I submitted yesterday, they are filing something—should they do that, it will still be important to understand why the Department of Justice knowingly misled the Supreme Court on a crucial matter for nearly 3 weeks. That in itself was a serious breach of duty. The breach is aggravated by the only possible explanations. One possibility is that they hoped the Court would actually be misled into throwing the cases out as moot. That would relieve the Government of various political problems. The other possibility is that maybe they didn't really want that to happen, but they still found the risk of misleading the court more acceptable than the political costs of angering some of the administration's allies by straightening the Court out. Either explanation, I am afraid, is rather sordid.

That leads to point 11: If the Department of Justice does in the near future file a correction with the Court, it will be interesting to see, first, how it explains to the Court the 3-week delay, and, second, what it tells the Court about the revocation of those revenue rulings, the ones that the Department had told the Court on January 8 it had already placed in the shredder—the ones that the Department had said it had already commenced revoking forthwith.

The January 25 submission by Justice to the district court was strangely silent about the revenue rulings. Not a word was said about the issue. If those rulings are not being revoked after all, then the Supreme Court had better be so informed, for the deception continues. If the revenue rulings are being revoked, then the House and Senate must be so informed, because the promise made to this body—that, until it acts the only recipient of tax breaks for racist schools will be *Bob Jones* and *Goldboro*—that promise cannot be kept.

My basic conclusion is that the problem that has been partially exposed and that I hope will be exposed more fully when the administration testifies, lies much more in the realm of ethics than in the world of tax policy.

What I am afraid we have seen is a sad display of cynical disregard for simple truth, calculated defiance of law—including existing judicial decrees that bind the very Department of Justice that claims there is no law on the subject—and callous disrespect for the equal dignity of every citizen.

The need, if I am right in these evaluations, is not for more laws or resolutions, but for a deeper look, by this or by some other appropriate committee, into how executive officials, so personable and so well meaning, could have taken their constitutional duties and our constitutional rights so casually.

Thank you very much.

[The statements of Mr. Tribe follow:]

STATEMENT OF LAURENCE H. TRIBE, PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

CONSTITUTIONAL IMPLICATIONS OF THE ADMINISTRATION'S DISREGARD OF JUDICIAL DECREES AND CONGRESSIONAL ACTIONS REGARDING THE TAX STATUS OF RACIALLY DISCRIMINATORY PRIVATE SCHOOLS

I. Introduction

I am honored to appear at the Committee's invitation to testify about the implications of the Administration's recent repudiation of settled legal principles and binding judicial decrees regarding the tax status of racially discriminatory private schools.

As I trust both my prepared testimony and my discussion with the Committee will make clear, high officials of the Executive Branch, including the Secretary of the Treasury, the Attorney General, and the President himself, have abruptly undertaken to accord favored tax treatment to certain racially discriminatory private schools, in derogation of the basic duty of these officials faithfully to execute the Constitution and laws of the United States. These departures from the rule of law have, in turn, been both facilitated and aggravated by serious misrepresentations to the press, the public, and the Supreme Court.

Thus, if any action by Congress is called for, it is not legislative action to clarify or change the tax status of racist schools—a matter that was relatively clear until the Administration muddied it—but investigative and other corrective action to explore and remedy what appear to be grave abuses of office at the highest levels of the Executive Branch.

II. The Administration's Abrogation and Misrepresentation of Settled Law Regarding Tax Benefits for Racially Discriminatory Private Schools

A. The administration's January 8 announcement of intent to give favorable tax treatment to racially discriminatory schools

On January 8, 1982, the Treasury Department and the President announced publicly, and the Justice Department officially advised the Supreme Court, that the Government no longer read the Internal Revenue Code to deny tax-exempt status under section 501(c)(3) to racially discriminatory private schools or to deny tax deductions under section 170(c)(2) for contributions to such schools, and that the Treasury had accordingly "commenced the process necessary to revoke forthwith the pertinent [IRS] Rulings" implementing the prior understanding of the Revenue Code. At a press conference on January 8, spokesmen for the Treasury Department stated that this action would restore tax-exempt status to more than one hundred racially discriminatory schools. In Treasury's view, the IRS lacked "legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy." According to Deputy Secretary of the Treasury R. T. McNamar, the administration, in implementing this new position, was merely "attempting to protect the independence of all private tax-exempt organizations—many of which may follow practices and adhere to principles with which we disagree." On January 8, and at subsequent press conferences, the President, too, stated that the long-standing IRS denial of tax-exempt status for discriminatory schools had "no basis in the law," and represented only a decision by the IRS "to govern by administrative fiat."

B. The applicable law: judicial and congressional actions with respect to tax benefits for schools discriminating against racial minorities

With all respect, these statements are simply preposterous. Although some of the underlying issues are not beyond debate, there is no doubt whatever that the denial of tax exemptions and deductions for racially discriminatory private schools reflects no mere policy preference by IRS officials; such denial is, instead, the direct result of definitive federal court orders requiring the Executive Branch to stop granting tax exemptions to private schools that discriminate on the basis of race and tax deductions to those individuals whose contributions help keep such schools afloat.[1] Every federal appellate court to consider the issue since 1971 has reached the same conclusion—namely, that the "policy" now denounced by the Administration as lacking legal foundation is, in truth, a rule of law mandated by the Internal Revenue Code, properly construed. Equally important, there has been general agreement that any contrary reading of the Code would, at the very least, "raise serious constitutional questions." *Green*, supra, 330 F. Supp. at 1164, for "the tax-exempt status at issue," as a "government benefit not available to the public generally," *Wright* v. *Regan*, 656 F. 2d 820, 831 (D.C. Cir. 1981), petition for certiorari pending, is a form of special government support that obstructs public school desegregation and that black schoolchildren and their parents reasonably contend "stigmatizes [them] by signalling official approbation of educational institutions that perpetuate . . . notions, once prevalent in our nation, of the inferior quality of the black race," 656 F. 2d at 836-37. *See Norwood* v. *Harrison*, 413 U.S. 455, 467 (1973)(government's "constitutional obligation [is] to steer clear . . . of giving significant aid to institutions that practice racial . . . discrimination.")[2]

Congress itself, as the Court of Appeals for the District of Columbia Circuit recently noted, "appears to agree . . . that section 501(c)(3) does not accommodate tax-exempt status for racially discriminatory private schools." *Wright*, supra, 656 F.2d at 834 n.40. For "Congress overturned a court holding, *McGlotten* v. *Connally*, 338 F. Supp. 448, 457-59 (D.D.C. 1972) (three-judge court), that nonprofit social clubs, although racially discriminatory, were eligible for tax-exempt status under section 501(c)(7). Congress added section 501(i), which explicitly denies exempt status to social clubs that discriminate 'against any person on the basis of race, color, or religion.' . . . The Senate Report on the private club provision cites *Green* [the 1971 three-judge court ruling discussed in note 1 supra] as the leading case on tax-exempt status under section 501(c)(3) for educational institutions, and reflects an understanding that race discrimination disqualifies private schools from obtaining or retaining tax exemption. S. Rep. No. 1318, 94th Cong., 2d Sess. 8 n.5 (1976), . . ." 656 F.2d at 834 n.40. Indeed, when Congress in 1979 twice passed appropriations riders to restrict the use of federal funds to carry out certain proposed IRS guidelines for enforcing the denial of exempt status to discriminatory schools,[3] it was common ground that the basic requirements of denying tax benefits to such schools through some procedure remained intact: "We are just saying do not go forwared with these broad [IRS] regulations or procedures . . . ." 125 Cong. Rec. H5882 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook). As Senator Helms put it when supporting such a rider, "existing law [already] provides substantial procedures for the IRS to deny the tax exempt status of schools which discriminate . . . [The riders] preserve the ability of IRS to act against offending schools on a case-by-case basis." 125 Cong. Rec. S11979-80 (daily ed. Sept. 6, 1979).

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[1] In 1971, a three-judge district court permanently enjoined the Treasury Department from granting tax-exempt status to private schools engaging in racial discrimination. *Green* v. *Connally*, 330 F.Supp. 1150 (D.D.C. 1971)(three-judge court), aff'd mem. sub nom. *Coit* v. *Green*, 404 U.S. 997 (1971). Although the injunction by its terms reached only Mississippi schools—the only schools directly involved in the litigation at that time—the court made clear that it was "laying down [no] special rule for schools located in Mississippi" and that the "underlying principle. . . is applicable to schools outside Mississippi with the same or similar badge of doubt." 330 F.Supp. at 1174.

[2] As the Fourth Circuit observed, Internal Revenue Code Sections 501(c)(3) and 170(c)(2) are "rooted in public policy considerations wholly apart from the "broad basis policy of taxing "net, not . . . gross, income."""" *Bob Jones University* v. *United States*, 639 F.2d 147, 152 (4th Cir. 1981), cert. granted 50 U.S.L.W. 3278 (U.S. October 13, 1981). *See* H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939)(exemption under 501(c)(3) is based on theory that resulting loss of federal revenue is offset by benefits for which public would otherwise have to pay directly). This *not* a situation, therefore, in which the Government is merely refraining from taxing certain properties or transactions on a wholly neutral theory derived from the nature or definition of the tax involved.

[3] *See* Treasury, Postal Service, and General Government Appropriations Act, 1980, Public Law No. 96-74, 93 Stat. 559 (1979), secs. 103 (Ashbrook amendment) and 615 (Dornan amendment).

One would hardly expect less from a body that had enacted Title VI of the Civil Rights Act of 1964, requiring all federal agencies to deny financial assistance in any form to institutions which engage in race discrimination. In approving that provision, Congress was expressing its agreement with the observation of President Kennedy that "[s]imple justice requires that public funds, to which all taxpayers contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination." H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess., 3, 12 (1963). Although Title VI does not expressly require denying tax benefits to racist schools, its underlying philosophy, like that of the Constitution's equal protection mandate, points unerringly to the denial of special exempt status to such schools, and to the denial of special deductions for those who support these schools with private bequests and gifts.

When I testified before this Committee's Subcommittee on Oversight on February 21, 1979, I expressed confidence that the then-recent district court decision to the contrary, *Bob Jones University* v. *United States*, 468 Fed. Supp. 890 (D.S.C. 1978), was an aberration that could not "be expected to survive appellate review." Hearings on Proposed IRS Revenue Procedure Affecting Tax-Exemption of Private Schools, Part 1, at 372 (Feb. 20-21, 1979). That prediction proved correct two years later when the Fourth Circuit in 1981 reversed the district court's ruling, 639 F.2d 147, and upheld the IRS's non-discrimination requirement as applied to private educational institutions whose religions mandate racially discriminatory policies and practices. Nothing in the First Amendment's Religion Clauses, I testified in 1979 and the Fourth Circuit held in 1981, requires that anti-discrimination rules in the tax area be bent "at the sacrifice of an interest as weighty as that of removing the vestiges of racial discrimination from the educational institutions of this country." Hearings, supra, at 372. *See* 639 F.2d at 153-55. I recall my 1979 testimony at this point not to suggest any unusual prescience on my part; far from it. That I could so confidently predict the outcome of *Bob Jones* in the Fourth Circuit shows only that the applicable legal principles were, even then, unusually clear.

To be sure, the Fourth Circuit's endorsement of these principles is currently pending on certiorari in the Supreme Court, which decided on October 13, 1981, with the Government's assent, to review both *Bob Jones* and *Goldsboro Christian Schools* v. *United States*, No. 80-1473 (4th Cir., unpublished), cert. granted 50 U.S.L.W. 3278. But it is the Reagan Administration, which now says that it disagrees with the Fourth Circuit's rulings in this pair of cases, that has attempted, as I explain below (*see* Sections II-D and III, infra), to prevent the Supreme Court from speaking authoritatively on the issues involved. If the Administration's effort were to succeed, those who defend as correct the Fourth Circuit's decision (and that of every other appellate court that has taken up these questions) could hardly be blamed for the absence of a "last word" from the Supreme Court on this subject.[4]

C. The administration's unequal treatment of racial minorities in the formation of tax policy

To turn the tables in such a way would single out black schoolchildren and their parents for a uniquely burdensome approach to tax policy. They, and they alone, would labor under the bizarre presumption that a decade-old IRS rule protective of their rights—a rule repeatedly upheld by the courts as required by existing law and repeatedly approved by Congress itself as correctly reflecting congressional intent—may suddenly be suspended by unilateral executive action, "without notice or public consultation,"[5] and may thereby be rendered a nullity unless and until these black children and their families somehow persuade Congress to "pick up the pieces"[6] by legislatively restoring the status quo ante.

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[4] Insofar as there *has* been such a "last word," it was, of course, consistent with the Fourth Circuit's position. *See Coit* v. *Green*, supra, note 1. A unanimous Supreme Court later relied on the Court's summary affirmance in *Green* to support the conclusion that free textbooks could not be supplied at public expense to pupils attending racially discriminatory private schools. *Norwood*, supra, 413 U.S. at 463-64. Whatever the limits as precedent of the Court's summary affirmance in *Green*, *see Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n. 11 (1974), it remains the Supreme Court's only direct pronouncement on the point.

[5] B. Wolfman, "Law, Cut On a Bias," N.Y. Times, Jan. 19, 1982, at A27.

The Supreme Court has held, in analogous circumstances, that the constitutional norm of equal protection of the laws precludes placing unusually heavy burdens in the path of those who seek governmental protection against private racial discrimination. *Hunter* v. *Erickson*, 393 U.S. 385 (1969).[7] Whether the special hurdle of a required re-run through Congress' gauntlet is imposed "only" upon the specific black families injured by the schools directly involved in the *Bob Jones* and *Goldsboro* cases now pending in the Supreme Court, or upon *all* black children and parents similarly situated (*see* Section III infra), it seems plain that no hurdle of remotely comparable height is imposed for other groups adversely affected by proposed or contested IRS rulings or practices. Such groups, unlike those injured here, have always been free to persuade the IRS or the Treasury Department, especially when intermediate appellate courts have agreed, that the injury they seek to avoid is already barred by the Internal Revenue Code.

For these reasons, even if the Constitution did not independently compel the denial of tax benefits to racist schools, I would conclude that the Administration's imposition here of a requirement of explicit congressional approval that is imposed nowhere else would violate the Government's constitutional duty to respect black citizens no less than white.

D. The administration's attempted manipulation of pending judicial proceedings

In any event, Congress has spoken in this area with sufficient clarity and frequency, and with sufficient judicial support, to make any sudden call for new legislation extraordinarily puzzling at the very least. And such a call becomes worse than puzzling when it comes from the very government officials and departments that are currently subject to judicial decrees expressly designed to provide relief from tax-supported segregation "on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." *Green*, supra 330 F. Supp. at 1170–71.

On May 5 and June 2, 1980, the United States District Court for the District of Columbia issued orders supplementing the permanent injunctive decree previously issued in *Green*, supra, and laying down general standards to be applied by the Treasury to determine whether a private school is truly nondiscriminatory. The Government did not appeal those orders, which led to the withdrawal of exempt status from five additional private schools.[8] Shortly, thereafter, the Clarksdale Baptist School was granted leave to intervene in the reopened *Green* case in order to litigate its claim that the district court's orders violated that school's First Amendment rights—a claim similar to the one already rejected by the Fourth Circuit in the pair of cases that the Supreme Court on October 13, 1981, agreed to review. Despite the Government's agreement throughout the litigation with the position the IRS had long taken, the Government expressly supported the Court's granting of certiorari to review the Fourth Circuit's rulings in favor of the IRS in that pair of cases in order to "dispel the uncertainty surrounding the propriety of the Service's ruling position and [to] foster greater compliance on the part of the affected institutions." Brief at 17. Since the Supreme Court's anticipated ruling could offer clarifying guidance, the Clarksdale Baptist School asked the district court, on December 11, 1981, to stay further proceedings pending the outcome of *Bob Jones* and *Goldsboro* in the Supreme Court. Four days later, on December 15, 1981, the Government "strongly" endorsed the school's request for a stay, which the district court accordingly granted on January 6, 1982.

Just two days later—on January 8, 1982—the Government, having thus supported a stay of proceedings in the district court pending final resolution of the underlying questions by the Supreme Court, urged the Supreme Court *not* to resolve those questions, but to vacate the Fourth Circuit's *Bob Jones* and *Goldsboro* judgments in light of the Administration's sudden decision to abandon those judgments and to grant tax exemptions to the two schools involved and to all others similarly situated. It was the Government's posture, as of January 8, that the two cases pending in the Supreme Court had become moot by virtue of this administrative decision. At no point has the Justice Department even suggested, however, that the Fourth Circuit made any error of law.

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[6] *Id.*

[7] *Hunter* struck down a two-track system of lawmaking under which laws to combat private racial discrimination in housing were harder to enact than laws addressing other housing matters.

[8] *See* 1981-37 I.R.B. 102 (Sept. 14, 1981.)

Had the Treasury simply acquiesced on an ad hoc basis in the positions of the two taxpayers involved in the pending cases, the shift might well have proved insufficient to oust the Court of jurisdiction, given Supreme Court decisions holding that "voluntary cessation of allegedly illegal conduct does not . . . make [a] case moot," *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953), at least where there is no "clear proof" that the "continuing practice" of which the conduct was an instance "[has] been abandoned." Id. at 632 n.5. Knowing that "courts . . . beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when . . . timed to" coincide with litigation, id. at 632-33 n.5, the Government told the Supreme Court that the Treasury had actually begun "the process necessary to revoke forthwith" all of the rulings underlying denial of tax-exempt status for all similar schools. There was, the Court was told, a wholesale shift in legal position by the Administration—as a result of which no live dispute remained regarding the tax-exempt status of racially discriminatory private schools.

It is noteworthy that the Government said nothing on January 8 to inform the Supreme Court that, just two days earlier, Justice Department officials had sat silently by as the district court granted a motion they had strongly supported to stay proceedings in that court pending the Supreme Court's awaited clarification in *Bob Jones* and *Goldsboro*.[9] Nor was the Supreme Court informed by the Government that the Treasury Department's restoration of beneficial tax treatment to racially discriminatory schools would require direct defiance of still binding judgments that had been entered in the recently reopened *Green* case—and that the actions by the Treasury Department which would supposedly suffice to moot the case (and thus to prevent the Supreme Court from providing the very clarification that the Government only recently had claimed it was eagerly awaiting) might thus entail contempt of the United States District Court for the District of Columbia. *See Walker* v. *Birmingham*, 388 U.S. 307 (1967) (contempt conviction not dependent on ultimate validity of judicial order disobeyed).

On January 13, 1982, plaintiffs in the reopened *Green* litigation asked the district court for a further injunction to protect the relief they had previously won—by preventing Treasury officials from taking the very steps the Justice Department had told the Supreme Court they would take in order to moot the *Bob Jones* and *Goldsboro* cases pending in that Court. So far as I have been able to ascertain, although the plaintiffs in *Green* have called the Supreme Court's attention to the pendency of their request for such nationwide injuction relief, the Government itself has done nothing at all to assure that the Supreme Court is in fact informed of the very considerable cloud thereby cast over Treasury's capacity to perform the promise on which its January 8 claim of mootness rested.

III. The Apparent Emergence of an Attempted Coverup by the Executive Branch in the U.S. Supreme Court

The Government's quite stunning lack of candor in dealing with the Supreme Court in these cases does not stop, however, with this failure to inform the Court of the developments in the district court (*see* Section II-D supra) that have generated substantial doubt as to the Government's actual ability to execute its stated intention of promptly restoring tax-exempt status to the hundred or more schools that, like Bob Jones University and Goldsboro Christian Schools, discriminate on grounds of race. Worse still, even the Government's own intentions are now being misrepresented in the Supreme Court. For the remarkable truth is that, after the public outcry that greeted its proposed change in policy, the Government announced not only (1) that it would seek new congressional legislation to restore the old tax policy, but also (2) that the Secretary of the Treasury had "instructed the Commissioner of Internal Revenue not to act on any applications for tax exemption filed in response to the Internal Revenue Service's policy announced on Friday, January 8, 1982, until Congress has acted on the proposed legislation (except as required by the memorandum in support of the motion to vacate as filed in the Supreme Court on January 8, 1982)."

This Treasury Department announcement of January 18, 1982, was echoed in a letter of the same date sent by President Reagan to the President of the Senate and the Speaker of the House of Representatives. Lest its extraordinary signifiance for the pending *Bob Jones* and *Goldsboro* cases be missed, it should be noted that the President's letter, and the Treasury Department position it reported, add up to a complete about-face with respect to the Executive's intended conduct, pending congressional action on the proposed legislation, vis-a-vis all racially discriminatory schools other than *Bob Jones* and *Goldsboro*. Specifically, it now appears that, directly contrary to the Justice Department's only official statement on the subject to the Supreme Court, the Government has told Congress that it has no intention whatever, while it awaits possible congressional action, of implementing *any* new policy to grant exempt status to racially discriminatory schools or, presumably, to allow tax deductions for contributions to such schools. The Treasury will offer such status, and the dollar benefits that go with it, only to the two specific schools whose cases reached the Supreme Court when it granted certiorari on October 13, 1981. And the Treasury will do so, notwithstanding the absence of any rational basis for distinguishing those two schools from all others, only to "support . . . the motion to vacate as filed in the Supreme Court on January 8, 1982," so that the Court might be persuaded not to provide the legal guidance that the Government itself had sought.

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[9] *Cf. Giles* v. *Maryland*, 386 U.S. 66, 99 (1967) (addendum to concurring opinion) ("deliberate concealment and nondisclosure by the State are not to be distinguished in principle from misrepresentation.")

It appears that the Supreme Court has received no communication from the Justice Department, or from anyone else, to correct the now false statements contained in the Department's January 8 submission urging the Court to vacate the Fourth Circuit's rulings on grounds of mootness. So far as the Court was officially informed when it proceeded to consider those rulings at its most recent Conference (that of January 22, 1982), and so far as the Court is officially informed today, the Government still intends to implement "forthwith" a policy of granting tax exemption for all otherwise eligible schools regardless of race discrimination.

Even if the Supreme Court were charged with a roving commission to parse Treasury Department press releases and White House communications to the House and Senate, which it most assuredly is not, the Government's shift away from its January 8 position, while legally crucial, has hardly been so obvious as to attract general attention.[10] It is hard to avoid the conclusion that the Department of Justice, under the Administration's direction, is fully prepared to have the Supreme Court act in this matter under the false impression that the Government is moving with all deliberate speed to restore tax-exempt status to racially discriminatory private schools while awaiting new legislation on the subject.

The only conceivable reason to encourage this false impression in the Supreme Court is to increase the likelihood that the Court will regard the pending controversy as moot, and will accordingly vacate the Fourth Circuit's rulings against tax benefits for racially discriminatory schools and colleges. And the only imaginable reason to wish for such action by the Court is, in turn, to reduce the risk that the Supreme Court, like every other appellate court that has analyzed the issue, would rule—if given the chance—that the Internal Revenue Code already requires denial of tax exemption for all schools, religious or secular, that discriminate against racial minorities. To reduce the chance that the Supreme Court will embarrass the Administration by such a holding,[11] the Administration seeks to withdraw the pending cases from that Court—not by stripping the Court of jurisdiction over such cases, a step that would require controversial legislative action by Congress,[12] but by the far simpler route of misleading the Court as to the facts of cases pending before it.

It has been less than a decade since the United States Supreme Court in the Nixon Tapes Case proclaimed the necessity for full executive disclosure in pending judicial proceedings lest federal courts be induced to dispose of important matters on the basis of an incomplete or distorted record. *See United States* v. *Nixon*, 418 U.S. 683, 709 (1974). That this case involves a far more personable Chief Executive and a more urbane and sympathetic set of subordinates cannot be permitted to obscure the deeply distressing parallels between the two episodes. For the President to permit, and for the Attorney General to encourage, the filing of misleading submissions in the nation's highest court, without correction even when such submissions have become positively false, hardly seems consistent with the constitutional obligation of the Chief Executive, and of the highest-ranking law enforcement official in the land, to "take care that the laws be faithfully executed."

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[10] The first reference to this shift in the press, so far as I am aware, was a statement in the Feb. 1, 1982, Wall Street Journal, reporting that "[g]overnment lawyers are considering whether to update the court on developments, but hours of meetings between Treasury and Justice Department officials have failed to produce a consensus on what to say." P. 40, col. 4 (continued from p. 23, col. 3). The truth might be a start.

[11] This risk, while perhaps reduced by the doubts expressed in *Prince Edward school Foundation* v. *United States*, 101 S.Ct. 1408 (1981) (Rehnquist, J., joined by Stewart and Powell, JJ., dissenting from denial of certiorari), obviously remains considerable.

[12] *See* Tribe, "Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts," 16 Harv. Civ. Rts-Civ. Lib. L. Rev. 129 (1981).

IV. Conclusions

It would appear that the Attorney General, and indeed the President himself, owe Congress and this Committee an accounting—not only for their proposed expenditure of federal tax revenues, collected from black and white taxpayers alike, to support racially discriminatory schools, but also for their ongoing deployment of tax dollars in a campaign calculated to conceal awkward truths about the state of the applicable law, and to obstruct judicial clarification by steps as extreme as misleading the United States Supreme Court about key facts bearing on the Court's jurisdiction to provide such clarification in a pending case.

If the Ways and Means Committee shares my conclusion that the problem exposed by the Administration's recent actions is less one of tax policy than one of ethics—of cynical disregard for truth, calculated defiance of law, and callous disrespect for the equal dignity of all citizens—then this Committee might well urge the appropriate bodies in the House to set in motion a full-scale investigation into how such breaches of constitutional duty came to pass—and into the remedies Congress might most appropriately invoke.

SUPPLEMENTARY STATEMENT OF PROF. LAURENCE H. TRIBE ON THE "CONCURRENT RESOLUTION" COMPROMISE TO THE TAX-EXEMPTION FIASCO

The currently emerging "compromise" of a Concurrent Resolution retroactively ratifying or approving the decade-old IRS practice of denying favored tax status to schools that engage in racial discrimination is constitutionally doubtful and would indeed be dangerous.

1. Under Article I, Section 7, Clause 3 of the Constitution, a Resolution that is neither signed by the President nor passed over his veto cannot have the effect of legislation. The Constitution gives Congress only one way to make laws; expressing the "sense" of the House and/or the Senate is not it.

2. Viewed instead as an expression of Congress' current views about the correct interpretation of the Internal Revenue Code, a Resolution would be, at best, an exercise in futility—transparently political in purpose, and of questionable legal effect. As the Supreme Court has repeatedly held, "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (quoting *Rainwater* v. *United States,* 356 U.S. 590, 593 (1958)).

3. If designed to affect pending judicial proceedings, such a Resolution would, in addition, violate basic separation-of-powers principles, which dictate that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177–78 (1803). It is axiomatic that Congress may share neither the judicial role of interpreting extant laws nor the executive role of administering and enforcing those laws. It is ironic that the Reagan Administration and its Justice Department have emphatically made just this point in pressing a constitutional challenge to legislative veto provisions, a challenge that led the Ninth Circuit to strike down legislative vetoes in *Chadha* v. *Immigration & Naturalization Service,* 634 F.2d 408, 431–34 (1980) (to be argued in the Supreme Court this February 22) and the District of Columbia Circuit to do likewise in *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission,* No. 80–2184 (January 29, 1982). As the Supreme Court held in a landmark decision shortly after the Civil War, an attempt by Congress to instruct the federal judiciary on the correct resolution of pending legal questions "passe[s] the limit which separates the legislative from the judicial power" and is thus null and void. *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 146–47 (1872). Cf. *Buckley* v. *Valeo,* 424 U.S. 1, 120–24, 133–43 (1976).

4. Finally, taking the Resolution approach here would create an awful dilemma. Regarding an advisory resolution as necessary to shore up a decade-old IRS interpretation that has repeatedly been upheld by the courts would either set a dangerous precedent for the multitude of other areas in which Congress would then be asked to vote up or down on Treasury or other agency practices or rulings or regulations, or would represent a racially discriminatory defiance of precedent in which only black schoolchildren and their parents must go the resolution route. For if only black children and their parents must obtain congressional resolutions to ratify their administrative and judicial victories, then we are operating under a deeply racist double standard—one violative of equal protection. *See Hunter* v. *Erickson,* 393 U.S. 385 (1969) (striking down two-track system under which laws to combat private racial discrimination in housing were harder to enact than laws addressing other housing matters). If, on the other hand, everyone is to be subjected to a resolution requirement, then thousands of entirely lawful practices and regulations will

be cast into a debilitating limbo of doubt unless Congress clogs its agenda with the impossible task of reviewing and approving every last one.

ADDENDUM TO SUPPLEMENTARY STATEMENT OF LAURENCE H. TRIBE

The only Concurrent Resolution that might avoid the problems identified in my supplementary statement would, in my judgment, be a resolution along the following lines:

Whereas the commitment of the United States of America to racially integrated education and to racial justice under law must not be compromised or cast into doubt; and

Whereas orderly statutory, administrative, and judicial procedures must not be abrogated, disregarded, or circumvented, *Be it resolved, as expressing the sense of the House of Representatives and of the Senate of the United States:*

1. That the Executive Branch should be censured for having acted improvidently and in derogation of its duty faithfully to execute the Constitution and Laws of the United States when it unilaterally proclaimed on January 8, 1982, a policy of favored tax treatment for racially discriminatory private schools and for those who contribute to such schools, and accordingly abandoned its previously announced defense in the Supreme Court of the long-standing anti/discrimination rules and practices followed by the Internal Revenue Service and consistently upheld by the federal courts;

2. That the Justice Department in particular is deserving of censure for having knowingly withheld from the Supreme Court, for a substantial period commencing on January 18, 1982, information crucial to the continuing jurisdiction of that Court to decide the validity of Internal Revenue Service anti-discrimination rules and practices sustained by the Fourth Circuit Court of Appeals and pending on review in the Supreme Court; and

3. That the President of the United States, the Attorney General, and the Secretary of the Treasury should, in the uncompromising discharge of their constitutional oaths of office, forthwith take all steps necessary and proper to assure the full and vigorous enforcement of the anti-discrimination tax rulings now pending before the Supreme Court, and to resume the defense in that Court of the statutory and constitutional validity of those rulings, as upheld by the Fourth Circuit Court of Appeals.

Explanation.—Such a resolution would restore the status quo ante without purporting to instruct the courts on questions of law, without presuming to inject Congress into the administrative process, and without either setting a dangerous precedent of congressional review of all administrative action or adopting a racist double standard in which only racial minorities must appeal to Congress before their victories in the administrative and judicial arenas are accepted as law.

Chairman ROSTENKOWSKI. Professor Rosenthal. The Chair would like to make an observation. It is not unusual for this committee to sit through lunch. Thus, it is the intention of the Chair to work at least through lunch to proceed with questions and exchanges. However, it is also the Chair's intention to have the administration's witnesses at the witness table no later than 1 p.m.

Professor Rosenthal, you may proceed.

STATEMENT OF ALBERT J. ROSENTHAL, DEAN, COLUMBIA UNIVERSITY SCHOOL OF LAW

Mr. ROSENTHAL. Thank you, Mr. Chairman, and ladies and gentlemen. My name is Albert J. Rosenthal, Dean of Columbia University School of Law.

I apologize. I have not prepared a written statement for the committee. I found out too late to be able to put one together. If the transcript of my remarks contains sufficent deathless prose that would be worth preserving, I will be very happy to duplicate them, edit them a bit, improve the grammar and send them to you.

I would like to address the question of tax exemptions to educational institutions that discriminate on the basis of race or color, what the present law is, and what need there might be, if any, for any new legislation on the subject. I will avoid getting into any question involving the activities of the Reagan administration or some of its officials or speculating as to what might or might not have motivated various things that they have done and narrow my comments to the legal issues.

As Professor Tribe has pointed out, section 501(c)(3) of the Internal Revenue Code provides tax-exempt status to certain charitable, educational, and other organizations, which exempts some of their income from various forms of taxation, such as unemployment insurance taxes on social security, and so forth.

Perhaps more important as a corollary to it is that, with very minor exceptions contributors to organizations that qualify under 501 for tax exemption receive tax deductions under section 170(c)(3).

The rule that such tax-exempt status does not apply to educational institutions that discriminate among their students on the basis of race or color is not an invention of zealous administrators of the Internal Revenue Service. It was compelled by the courts.

There is a solid line of judicial decisions requiring the Internal Revenue Service to do this whether it wanted to or not, under both statutory construction principles and also on the ground that there were constitutional reasons to suggest that any other construction of the relevant statutes might give rise to serious constitional problems. There has also been what I think any lawyer would regard as clear acquiescence by Congress in a period of about 11 years since the case of *Green* v. *Connally,* in which the Congress and perhaps particularly the committees that have been concerned with taxation have been involved in issues closely related to this and yet have never seen fit to overturn the denial of exemptions to those schools which discriminated on the basis of race.

New tax laws have come and gone during this 11-year period. There was considerable attention given to the subject of education, and particularly its racial aspects. There has been legislation relating to busing. There was a removal of tax exemption to certain social clubs that excluded members on the ground of race and other disqualifying features of that kind, and then finally there were the resolutions attached as riders to appropriation bills that limited certain IRS procedures for obtaining information from schools that claimed such exemptions as to their actual practices with respect to admission of minority students.

In every one of those instances, with all of this attention given to the subject, the basic principle that had existed at least since it was required by the courts in *Green* v. *Connally* has been reaffirmed.

To go back a bit in history, starting with *Brown* v. *Board of Education* in 1954, segregation by public schools was held unconstitutional under the 14th amendment as we all know. The private segregated schools arose in certain parts of the country as a response for those people who preferred to send their children to all-white schools.

The question arose as to whether such private segregated schools should be given tax-exempt status. The Internal Revenue Service initially took a rather cautious attitude to this problem, and since the basic assumption of *Brown* v. *Board of Education* and related cases was that the 14th amendment applied only to State action rather than private action, the first groping efforts of the IRS in the 1960's were to say that any private schools that segregated that got State support, were to be denied tax-exempt status.

That was probably the existing situation in 1970, when the case of *Green* v. *Connally* was brought up in the District Court for the District of Columbia. That was a class action brought on behalf of black students in the State of Mississippi whose contention was that the Internal Revenue Service had not been enforcing the rule against tax exemptions to racial discriminatory schools vigorously enough.

The three-judge Federal court in that case issued a ringing decision in which they held that this was a violation of law: First of all, taking the word "charitable" as it appeared in the statute there was a great historical gloss to be applied to this, and it meant in effect "consistent with the public policy of the United States."

The public policy of the United States had been clearly enunciated, *Brown* v. *Board of Education*, forbade segregated education. Title VI of the 1964 Civil Rights Act had been enacted in the interim, which provided that no Federal funds could be used to pay for any institution that has discriminated on the grounds of race.

Mr. **Gibbons**. Mr. Rosenthal, move the mike a little closer to you.

Mr. **Rosenthal**. Sorry. Please tell me if you can't hear, if I am not close enough.

Title VI of the 1964 Civil Rights Act provided that no Federal money was to go to any institution that discriminated on the grounds of race or certain other forbidden grounds.

This was all before the *Green* v. *Connally* case in 1970, and all cited by the court as reasons for showing what the public policy of the United States was. It was not necessary to go to the point of saying that Title VI specifically said that a tax exemption was a form of financial payment by the Government to the school in question Title VI might be construed either way, and I don't believe it has come up authoritatively. The point is it asserted a clear-cut public policy opposed to any kind of Government assistance to segregation.

Finally, the Court pointed out that if the Government does give this kind of assistance through tax exemptions to institutions that segregate, it would raises grave constitutional difficulties, in connection with the equal protection clause as carried over to the Federal Government by the fifth amendment. At least there would be great doubt, and it is a standard principle of statutory construction that one tries to construe a statute in such fashion as to avoid a difficult and serious constitutional issue rather than to meet one head on.

The parties in that case were black parents and schoolchildren in Mississippi, but the decision of the case, the precedent was a national one. One can say that as far as any actions that the Government might take now in granting tax exemptions in cases of this kind might be a contempt of court only if they applied to schools in Mississippi, but it clearly is a precedent.

This was a precedent for the entire country, just as *Brown* v. *Board of Education* may have involved schools in Topeka, Kans., and a few other companion cases, but it announced a rule of law that was binding upon all of the courts throughout the entire country.

Green v. *Connally* was taken up to the United States Supreme Court on appeal, not by the original parties, but by a party named Coit, who was, I believe, a parent of a white school child in one of the segregated academies who wanted the tax exemption to be continued, so this was a clear controversy up to that point.

I want to emphasize that the Supreme Court affirmed *Green* v. *Connally* in the case named *Coit* v. *Green* in 404 United States. It was not merely a denial of certiorari, refusal to review. It was a clear-cut affirmance without opinion, in other words, making that holding binding, and a precedent for the entire United States.

Since that time, there have been revenue rulings implementing the *Green* decision in 1971, 1972, and 1975, and I mention those dates only to illustrate that this isn't a partisan political matter. Those were years within the Nixon and Ford Administrations.

Also, there was more action in some other forums. In the Supreme Court, the case of *Norwood* v. *Harrison* which superficially might seem to involve altogether different issues, nevertheless came up and I think is quite in point.

This is in 413 United States in 1973. The question was whether it was constitutional for a State to give free textbooks to a private educational institution that segregated, and the Supreme Court held that it was unconstitutional for the State to do so. It cited the *Green* case as authority for the proposition that giving that kind of help to a segregated institution would be a violation of the Constitution of the United States, and if anyone has any doubt, this was not a decision of the Warren Court.

It was a unanimous, I believe, decision of the Burger Court with the opinion written by Chief Justice Burger, who stated among other things, and I quote, "Racial discrimination in State-operated schools is barred by the Constitution, and it is also axiomatic that a State may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."

In other words, if the same rule applies to the Federal Government under the fifth amendment, and if it is constitutionally forbidden to the States to encourage private segregation, it is constitutionally forbidden to the Federal Government to do so, and I think the *Norwood* case is quite solid authority for that proposition.

In 1972, a District of Columbia District Court case, *McGlotten* v. *Connally,* said that in connection with private social clubs that the same considerations did not obtain as with schools, and that the tax exemption should be granted to private social clubs even though they discriminated.

Congress overturned that in 1976, I believe the section of the Internal Revenue Code that incorporates the change is 501(i). The committee's statement that reported out this bill made it very clear that it was trying to make the law as to social clubs conform to what it already understood the law to be with respect to schools.

The Senate Committee report noted that: "Discrimination on account of race" in the case of a social club, "is inconsistent with an educational institution's tax-exempt status under 501(c)(3) and with its status as a charitable contribution donee under Section 170."

In other words, the premise of making this change with respect to social clubs was that we already had such a law with respect to educational institutions.

In 1976, the Supreme Court heard another case, called *Runyon* v. *McCrary,* in which it applied 42 United States Code, Section 1981, a very old provision, a modern codification of a rule that goes back to 1866 under the 13th amendment, and the Court held that 42 U.S.C. 1981 specifically forbade private schools from discriminating on the grounds of race or color.

This is all part of the public policy of the United States and there is a long line of cases that say that one does not give a charitable deduction to any organization whose practices violate the public policy of the United States. Just as in a motor vehicle case it was held that paying of fines for sending overweight trucks was against the public policy of the State and the fines were therefore not deductible, one could hardly claim racial discrimination was within public policy and therefore entitled to an exemption.

Mr. Chairman, does that buzzer mean I should stop or anything? I am not too familiar with your procedures.

In 1978 and 1979, the Internal Revenue Service proposed a series of guidelines that were intended to put more teeth into the prohibitions against racial discrimination in schools for those who sought tax exemption for those schools.

A number of questionnaires and various tests were proposed. These were criticized as complex and burdensome, and in riders to appropriation bills the Congress voted in effect to forbid the Internal Revenue Service from spending any money on implementing that kind of questionnaire or regulation, but once again, the premise for that kind of thing was that the basic rule that it was illegal to give a tax exemption to a school that discriminated, that was reaffirmed in connection with these two amendments.

Representative Dornan stated, in introducing one of them on the floor of the Congress, "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71 and 75-50," and similarly, in submitting his amendment, Representative Ashbrook stated on the floor, "My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978 would not be touched. My colleagues surely know that existing revenue procedure 75-50 would be in effect."

So on all these counts, we have every indication that Congress was aware of the rule, and had no desire to change it.

If we look over what has happened in the Federal courts since, there have been three fairly recent appellate decisions, all going the same way, and that is that these schools that discriminate are not entitled to a tax exemption. These three cases in 1980 and 1981, which you have heard of, were *Bob Jones University* v. *the United States,* in the Fourth Circuit, *Goldsboro Christian Schools, Inc.* v. *the United States* in the Fourth Circuit, and *Prince Edward's School Foundation* v. *the United States* in the Court of Appeals of the District of Columbia.

All I can say in conclusion is that we have the solid history of a statute construed uniformally one way, with court decisions constantly coming out the same way, with every indication of awareness and agreement on the part of Congress as to that effect.

I agree completely with the President that we ought not to give tax exemptions to schools that discriminate. I think the case is overwhelming that existing law achieves that result without any need for any kind of change. I think it is a terribly bad idea to propose new legislation which may throw all of that into doubt.

It seems like the worst possible way to take a problem that is already solved, and unstick the entire thing and throw it up for uncertain results when no one can quite predict what is going to happen.

I can't advise this committee, which is much more expert than I am on the procedures of Congress, on how best to deal with this messy situation which the administration, I think, has put itself into to its own embarrassment and subjected this committee and Congress to considerable inconvenience.

I think this committee has the expertise to know best how to proceed in a matter of this kind. Thank you.

Chairman ROSTENKOWSKI. Professor Sanders, you may proceed.

STATEMENT OF MICHAEL I. SANDERS, ADJUNCT PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, PAST CHAIRMAN AND SPECIAL ADVISER TO THE EXEMPT ORGANIZATION COMMITTEE, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION

Mr. SANDERS. Mr. Chairman and members of the committee, my name is Michael Sanders. I am a practicing lawyer in Washington, D.C. I have specialized in Federal tax matters first as a trial attorney with the Department of Justice, then with the Treasury Department in the Office of Tax Legislative Counsel, and since 1970 in private practice.

I am past chairman of the Committee on Exempt Organizations of the American Bar Association. I am also an adjunct professor Georgetown University Law Center, where I teach tax-exempt organizations in the graduate tax program.

I am neither a Constitutional nor civil rights lawyer. Nevertheless, in my experience as a practicing lawyer and as a professor of exempt organizations, I have reviewed the statutory and judicial history involving tax exemption for racially discriminatory private schools.

I am testifying today in my individual capacity. A copy of my prepared statement has been introduced and should be made part of the record.

Since 1970, it has been the policy of the Internal Revenue Service to deny tax exemption to racially discriminatory private schools. This decision was made at the highest levels of the Nixon administration after review of the civil rights legislation and the Supreme Court decisions such as *Brown* v. *the Board of Education.*

It was followed by an injunctive order in the *Green* decision which was affirmed by the Supreme Court in 1971, was enforced by Congress in 1976, and has been followed by every Federal appellate court that has considered the issue.

In a series of three announcements over the past month, the administration has called into question the legal validity of *Green* and its progeny, accused the service of governing by administrative fiat and sought dismissal of the Supreme Court appeals in *Bob Jones* and *Goldsboro Christian Schools* which involved religious schools, and raised important constitutional questions.

Finally, the administration has asked Congress to adopt needless legislation. The administration's new position raises fundamental questions regarding the separation of powers. It has apparently misconceived the constitutional division of powers and the proper rule of an executive agency, the Department of Treasury, in carrying out its assigned function.

Indeed, the action may be viewed as an attempt through executive fiat to manipulate the branches of government to achieve a result that would serve certain private purposes at the expense of the national welfare.

The starting point in analyzing the administration's position is *Green* v. *Connally*. This case has been well analyzed by Professor Tribe and Dean Rosenthal.

I have interpreted the *Green* case in my statement. As a tax lawyer, I would like to use my time to discuss the impact of the recent administration actions, to focus on the role of the Internal Revenue Service in enforcing the law, and to address the legal options that are available to achieve a uniform national policy on racial discrimination in education.

First, with respect to Congress, the administration has said that the Service has no authority to deny tax exemption to discriminatory schools, and has asked Congress to pass legislation to provide such authority.

This interpretation is incorrect.

There is no legal basis for the Service, the agency charged with the enforcement of the tax laws, to take any other position. In my view, the proposed legislation is unnecessary since it would merely confirm the correctness of the Service's and the Court's interpretation of the law.

Legislation would be needed only if Congress wanted to change existing law to permit discriminatory schools to receive tax exemption.

Indeed, if Congress acts on the proposed legislation, it will unavoidably cast doubt on the validity of the *Green* decision. Moreover, proponents of discrimination in private schools would likely use the legislative process to raise unrelated issues such as sex discrimination in an attempt to delay or avoid compliance with the law.

Although I do not believe that the proposed legislation is needed, I will briefly comment now on several problems with the language in H.R. 5313, the administration's bill.

First, the bill does not provide guidance or criteria pursuant to which the Service could determine whether a school is nondiscriminatory. In addition, the bill's focus on whether a school has "refused" to act in a nondiscriminatory manner is ambiguous.

Must the school actually refuse to admit a black in order to be in violation, or is the legislation directed at the intent to discriminate as well? I also note in general that the draft does not distinguish between impermissible racial discrimination and permissible private philanthropy which benefits limited classes, such as scholarships for blacks.

If Congress decides to enact legislation along the lines proposed by the administration, it should make it clear that the legislation sets a special rule with respect to invidious use of racial discrimination and not a general policy which could inadvertently undermine desirable charitable activities.

Finally, the proposed legislation would do nothing to resolve the basic constitutional issues involving racially discriminatory private schools. Spokesmen for Bob Jones and Goldsboro have conceded that if enacted, the proposed legislation in its present form would result in the denial of tax exemption to both schools.

However, the first amendment issues raised by these schools which are presently before the Supreme Court would remain unresolved. Presumably, if the Supreme Court accepts the administration's motion to declare these cases moot, Bob Jones and Goldsboro would then need to return to the courts beginning at the lower court level to seek judicial resolution of the First Amendment issue. Bob Jones has been in court for 10 years attempting to resolve this.

This would result in an obvious additional expense and delay to all parties in the litigation. I believe the administration should withdraw its motion that the cases be dismissed as moot, and permit critical constitutional issues to be resolved in the Supreme Court.

It should also be noted that if the Supreme Court dismisses these cases as moot, presumably the Government's counterclaim against Bob Jones for more than $400,000 in back taxes would also be dismissed. Yet, at the same time, the administration proposes to retroactively deny tax exemption to all racially discriminatory schools effective July 9, 1970. Why should Bob Jones receive a benefit, the dismissal of the counterclaim for back taxes, that all other schools similarly situated may be denied?

The administration's statement that the Service's denial of exemption to discriminatory schools was an attempt to govern through administrative fiat has called into question the fundamental integrity of the tax system. This characterization is totally inaccurate. Indeed, the Service's 1970 decision was made, as I said, at the highest levels of the Nixon administration, with the concurrence of the President at a time when the Service was under a preliminary injunction to deny exemptions to discriminatory schools in Mississippi. This decision has been followed for 11 years by both the Republican and Democratic administrations.

The duty of the Internal Revenue Service is not to make public policy but rather to enforce the tax laws as promulgated by Congress and interpreted by the courts.

In the course of carrying out this duty, it makes countless determinations as to the scope and application of the tax laws, including, for example, such diverse questions as methods of accounting, depreciation, corporate reorganization, and also whether an organization is legally entitled to exemption under section 501(c)(3).

In order to discharge its duty to enforce and promote compliance with the tax laws in an even-handed manner, the Service is required to promulgate guidelines that inform the public as well as revenue agents how the Service interprets the law. Congress cannot be expected to enact legislation which is specific enough to focus on the facts and circumstances of each particular situation.

The area of private schools is no different from any other area in the tax law in this respect.

The Service's early guidelines, 75-50, focus on publicity, reporting, and recordkeeping requirements. However, experience showed that these guidelines only prohibited private schools from maintaining a formal policy of discrimination, and did not consider whether they in fact discriminated.

Indeed, in 1978 Commissioner Kurtz observed that some private schools that were adjudicated to be discriminatory were nevertheless able to maintain exemptions through compliance with the Service's existing rules. It was in recognition of the need for more guidance that the Service took the unusual procedural step, in 1978, of publishing in proposed form for public comment revenue procedures which would set forth more specific criteria for determining whether a school was discriminatory.

The guidelines in the proposed procedure were derived primarily from the criteria set forth in the injunction issued by the Green court, and in standards supplied by the Supreme Court in *Norwood* v. *Harrison*.

The Service held public hearings at which more than 250 witnesses, including several Members of Congress, testified on the proposed procedure. It received more than 125,000 written comments. Many expressed concern about the treatment of the so-called reviewable schools under the proposed procedure. While it was considered appropriate for the Internal Revenue Service to shift the burden of proof in cases of adjudicated schools, there was some doubt as to the fairness of the proposed guidelines as they would apply to the reviewable schools, since the mere point in time in which a school was formed or was substantially expanded may be an arbitrary criterion by which to address whether it had discriminatory practices.

In addition, many objected to the mechanical nature of the tests, and raised problems that would be created for some church-related schools, schools for the handicapped, and other special schools. In those cases, it might be difficult, if not impossible, for such schools to meet the mechanical test, although the schools did not intend to be discriminatory.

The Service took these and other comments into consideration, and again published for public comment a revised procedure in February 1979. Although the first procedure may have gone too far, the revised procedure modified the guidelines substantially to eliminate the prima facie presumptions and the mechanical tests, and provided relief to certain denominational schools that do not have a racially discriminatory practice, but may not attract minorities because of their ethnic focus.

In addition, most important, it provided the national office appeals and review in order to assure uniform application of the criteria. Although some may disagree with the proposed guidelines, the Service is to be commended on the procedures followed in publishing proposed rules, soliciting comments, and then publishing revised rules, which took into account many of these comments and attempted to formulate evenhanded, workable guidelines.

I want to clarify one final issue with respect to the Service's authority in the private school area. The administration's recent announcement stated that the Treasury Department had concluded that this kind of judgment, that is to deny tax exemptions, which may mean life or death for certain organizations, is fundamentally a question for Congress.

This statement ignores the fact that in response to the Supreme Court's recommendations in the first *Bob Jones* case in 1974, Congress enacted legislation in 1976 permitting an organization denied exemption by the Service to seek declaratory judgment in either the Tax Court, District Court for the District of Columbia, or U.S. Court of Claims.

The purpose of the legislation was to give an organization an expeditious right to judicial review as a check against possible mistakes in interpretation or even abuse in the exemptions process by the Service.

Many organizations have won exemption by challenging the Service's determination on the declaratory judgment action. Indeed, I understand that five private schools in Mississippi denied exemption by the Service under the Green criteria have instituted declaratory judgment action to litigate their claimed right to exemption.

The Treasury Department apparently overlooked the availability of the declaratory judgment remedy when it asserted that the Service has the power of life or death over would be exempt organizations.

The administration's actions now highlight a problem that has confronted the Service, Congress and the courts in recent years. How can we achieve a uniform national policy with respect to discrimination in private schools? Since October 1, 1979, Congress has in effect prohibited the Service through the appropriations riders, from formulating any guidelines that go beyond existing rulings in setting standards of nondiscrimination in private schools.

However, the pre-1979 standards are clearly inadequate, since private schools adjudicated to be discriminatory in Federal courts have been able to maintain tax exemption by adopting paper policies of nondiscrimination.

As a result of the conflict between the *Green* decision and the appropriation riders, the Service is currently operating under one standard for Mississippi schools and another standard for all other schools. This creates unfair distinctions among schools throughout the Nation, and effectively precludes evenhanded enforcement of the law by the Internal Revenue Service.

What is needed is a uniform set of standards that will guide both revenue agents charged with enforcement of the tax law, and private schools seeking to comply with the law and thus maintain exemption. Indeed, such guidelines could preclude the need for intensive examination of schools which demonstrate voluntary compliance by meeting certain specified criteria.

The question is how to achieve these uniform standards. There are three possibilities.

First, the appropriation riders clearly do not provide the necessary guidance and should be repealed or allowed to lapse. Congress could legislate substantive guidelines, provided they are consistent with the constitutional prohibition against racial discrimination. However, this would unnecessarily involve Congress in what amounts to be a regulatory process that the Internal Revenue Service has the personnel, expertise, and technical capacity to perform. If Congress subsequently determines that the Service's interpretation of what the law requires is incorrect, it may then intervene to provide substantive legislation.

Another possible source is the courts. The case of *Wright* v. *Regan* is currently pending on petition for certiorari before the Supreme Court on the standing question. In that case the plaintiffs have asked the court to extend the Green injunction to the Nation as a whole.

If the standing issue is favorably resolved to the plaintiffs, a decision on the merits may provide guidance. In addition, these issues may be addressed if the Supreme Court decides the *Goldsboro* and *Bob Jones* cases, and any legislative action should clearly await Supreme Court review of the first amendment issues.

However, it is at best uncertain whether judicial guidelines will be provided, and if so, whether they will be sufficient to give both revenue agents and private schools the guidance that they need. The obvious source of guidelines is the Internal Revenue Service. This is appropriate, since the Service already has substantial experience in auditing private schools, and could bring this experience to bear in formulating standards that would be workable for audit purposes.

Moreover, it is the agency that will ultimately be responsible for carrying out the standards.

The second proposed procedure reflected an effort to reach a reasonable balance and achieve evenhanded equitable guidelines. By providing for national office review of proposed revocation or denial cases, the Service attempted to insure that each affected school would receive consideration at the highest administrative level.

I believe that Congress should permit the Service to formulate and issue new guidelines. In view of the sensitivity of the situation, the Service should first publish the guidelines for public comment, as it did with the proposed revenue procedures in 1978 and 1979. This would give interested parties, including private schools and Members of Congress, an opportunity to study and comment on the proposed guidelines.

The Service should then be given an opportunity to make changes in light of the comments, then adopt and implement the guidelines.

The implementation of the tax laws is an evolutionary process. Only time and experience will demonstrate whether the guidelines that the Service may adopt are reasonable and equitable. However, there are checks and balances within the system if the Service goes too far.

First, Congress clearly has the power to intervene and legislate, if it finds that the Service's rules are inequitable and contrary to the intent of the law.

Second, under the declaratory judgment procedures, a private school may challenge denial of exemption. If Congress is concerned that the Service may have too much authority to deny exemptions on public policy grounds, it should consider liberalizing the declaratory judgment remedy, to give exempt organizations challenging denial of exemption on racial discrimination or other public policy grounds easier access to the courts to review the reasonableness of IRS actions.

To conclude, since the decision in *Brown* v. *Board of Education* in 1954, Congress, the courts and the executive branch have united to work for the eradication of racial discrimination in education. The law is clear. A private school that engages in racial discrimination is not entitled to exemption.

The administration's recent actions have had the unfortunate effect of appearing to favor racial discrimination in a manner that is harmful to the national public policy and repugnant to most Americans. To extricate itself from this politically damaging position, the administration is now seeking to place an unnecessary burden on Congress to adopt legislation that merely says that the law is the law.

I believe that Congress can best contribute to a solution by refusing to enact the administration's bill, and adopting a resolution such as that proposed by Congressman Rangel, which makes it clear that Congress views the proposed legislation as unnecessary since it would merely confirm the existing law.

In addition, Congress should eliminate the appropriations riders, which now stay the Service's hand, and permit the Service to issue guidelines as to whether private schools will be considered discriminatory. These guidelines would enable the Service to achieve evenhanded enforcement of the tax laws, and would provide substantive guidance for private schools that wish to comply with the law.

The administration has also attempted to use the exemption process as a means to manipulate the Supreme Court decision to hear the appeals in the *Bob Jones* and *Goldsboro Christian School* case. This action achieves nothing, and will cause all parties to the litigation needless delays and expense since the first amendment issue can ultimately be resolved only by the Supreme Court.

The administration's petition to vacate the appeal on grounds of mootness is unwise and should be withdrawn.

Finally, a word about private charity seems to me to be appropriate. The tax law fosters private charity because it can benefit narrower classes than is thought appropriate for Government-sponsored benefits. Tax benefits encourage diversity and should do so. Public policy intervenes only in the most extreme cases, and the fostering of racial discrimination is one of these very rare cases.

A philanthropist who wishes to endow a racially discriminatory institution is free in our society to do so, but he need not receive or expect a tax subsidy, however sincerely his action may be based on his personal beliefs.

Thank you.

[The statement of Mr. Sanders follows:]

STATEMENT OF MICHAEL I. SANDERS

My name is Michael I. Sanders. I am a practicing lawyer in Washington, D.C. I have specialized in federal tax matters, first as a trial attorney with the Department of Justice, then with the Treasury Department in the Office of Tax Legislative Counsel and since 1970, in private practice. I have long been an active member of the Section of Taxation of the American Bar Association, and am past Chairman of the Committee on Exempt Organizations. I am also an adjunct professor at Georgetown University Law Center, where I teach tax exempt organizations in the graduate tax program. I am neither a constitutional nor a civil rights lawyer; nevertheless, in my experience as a practicing lawyer and as a professor of exempt organizations, I have reviewed the statutory and judicial history involving tax exemption for racially discriminatory private schools. I am testifying today in my individual capacity.

I. Introduction

In 1970, the Internal Revenue Service determined that racially discriminatory private schools are not entitled to tax exemption under Section 501(c)(3) of the Internal Revenue Code. This decision was originally made at the highest levels of the Nixon administration, at a time when a three-judge federal panel in Green v. Connally had issued a preliminary injunction prohibiting the Service from granting tax exemption to discriminatory private schools in Mississippi.

The Green court subsequently made the injunction permanent with respect to Mississippi schools and stated that "the Service would be within its authority in including similar requirements for all schools of the nation". The Green decision was affirmed by the Supreme Court in 1971, was endorsed by Congress in 1976, and has been followed by every federal appellate court that has considered the issue.

On October 13, 1981, the Supreme Court granted certiorari in two cases involving religious schools, Bob Jones University and Goldsboro Christian Schools, to consider a constitutional question that was discussed but not at issue in Green: whether the First Amendment permits tax exemption for religious schools that engage in racial discrimination as part of their religion.

In a series of three announcements over the past month, the Administration has called into question the legal validity of Green and its progeny, accused the Service of "governing by administrative fiat", sought dismissal of the Supreme Court appeal in Bob Jones and Goldsboro Christian Schools, and asked Congress to adopt needless legislation. Specifically, the Administration

o Informed Congress that the Service lacks legal authority to deny tax exemption to discriminatory private schools unless Congress passes new legislation.

o Instructed the Service to withdraw its published rulings denying exemption to discriminatory private schools, but nevertheless not to grant exemptions to any schools except Bob Jones and Goldsboro Christian Schools pending Congress' consideration of the proposed legislation.1/

1/ Effective October 1, 1979, certain IRS action regarding the issue of tax exemptions for racially discriminatory

[Footnote cont'd on following page]

o Sought legislation which would merely confirm the correctness of the courts' and the Service's position since 1970 without providing additional guidance and without resolving the First Amendment issue that is before the Supreme Court in the Bob Jones and Goldsboro Christian Schools cases.

o Asked the Supreme Court to dismiss as moot the appeals of Bob Jones and Goldsboro Christian Schools on grounds that their exemptions have temporarily been restored, and thereby attempted to preclude the Court from ruling on the First Amendment issue.

The Administration's new position raises fundamental questions regarding separation of powers. The Administration has apparently misconceived the constitutional division of powers and the proper role of an executive agency--the Department of the Treasury--in carrying out its assigned function. Indeed, the action may be viewed as an attempt through "executive fiat" to manipulate the branches of government to achieve a result that would serve certain private purposes at the expense of the national welfare.

[Footnote cont'd]

private schools was stayed by Congress through amendments to the Treasury Appropriations Act of 1980. Two appropriations riders known as the "Dornan amendment" and the "Ashbrook amendment", dealt specifically with the issue. The Dornan amendment provided that none of the funds made available under the Act may be used to carry out the Service's proposed revenue procedures. (See discussion at pp. 16-18.) The Ashbrook amendment as originally in force provided more generally that no funds may be used "to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." The appropriations riders have been extended each year since 1979; for fiscal 1982, Congress included court orders in the Ashbrook amendment.

My testimony will address the legal issues with respect to tax exemption and discriminatory private schools. I will also consider the impact of the Administration's actions, including the proposed legislation and Supreme Court cases, and will focus on the role of the Service in enforcing the law. Finally, I will address the legal options that are available to achieve a uniform national policy on racial discrimination in education.

II. Legal Issues With Respect to Tax Exemption for Discriminatory Private Schools

As a threshold matter, the Administration has challenged the Service's authority to promulgate and enforce rules which would deny exemption to discriminatory private schools. The starting point in analyzing the Administration's position is with Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1970), aff'd. sub. nom. Coit v. Green, 404 U.S. 997 (1971). In that case, the court interpreted Section 501(c)(3) in light of the well-established doctrine in Federal tax law that congressional intent in providing tax deductions and exemptions should not be construed as applicable to activities which are illegal or contrary to public policy. The court applied this public policy doctrine to balance congressional intent to provide favorable tax benefits to educational organizations against the strong Federal policy against racial discrimination in education as reflected in the Civil Rights Act of 1964 and Supreme Court decisions such as Brown v. Board of Education, 347 U.S. 483

(1954). The court concluded that "[u]nder the conditions of today [the Internal Revenue Code] can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors".[2]

The court also recognized that the common law of charitable trusts which underlies Section 501(c)(3) may provide a second "public policy" basis for denial of exemption. Under the common law, trusts which qualified as "charitable" were accorded special benefits designed to protect their existence. Since the rationale for such preferred treatment was that the trusts were organized and operated for purposes which benefited the public, a trust which operated in a manner which was illegal or contrary to public policy would not be considered "charitable". Accordingly, the court observed that it is appropriate to interpret Section 501(c)(3) to require that an organization must be considered "charitable" under common law standards in order to qualify for exemption.[3]

The Green court also recognized a third argument in support of the Service's position--that the Constitution prohibits the granting of Federal assistance to a racially discriminatory private school. It suggested that the Constitution may not permit the government to provide tax exemption, which is in effect federal assistance in the form of a matching grant from the Treasury, to a racially discriminatory school.

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[2] 330 F. Supp. 1150, 1164 (1971).

[3] This interpretation has been challenged by religious organizations in the Bob Jones and Goldsboro Christian Schools cases. See discussion at pp. 9-10.

Although the Green injunction was technically limited to Mississippi schools because of the nature of the class action, the court made it clear that the underlying principle was intended to apply on a national basis. The court stated that "to obviate any possible confusion the court is not to be misunderstood as laying down a special rule for schools located in Mississippi"[4/] and made it clear that the Service has authority to apply the rule on a nationwide basis. The court also explained why it was compelled to issue the injunction even though the Service had voluntarily argreed to comply:

> The July 1970 Press Release does not indicate whether the new construction is considered mandatory or merely within the sound discretion available to the IRS in construction of the Code. If defendants' construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion. (Emphasis added).[5/]

4/ 330 F. Supp. 1150, 1174 (1971).

5/ Id. at 1170-1171 (1971).

Ironically, it is such a "shift in the tides of administration" about which the *Green* court was concerned that has brought us here today.

The district court decision in *Green* was affirmed *per curiam* in 1971 by the Supreme Court and endorsed by Congress in 1976, when it added Section 501(i) to the Code. The purpose of that provision was to deny tax exemption to discriminatory social clubs and thus overrule the portion of a federal district court decision (*McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C., 1972)), which held that social clubs were entitled to tax exemption notwithstanding their racially discriminatory membership policies. The Senate Report on the legislation recognized that *Green* is the law under Section 501(c)(3) and specifically stated that Congress' intent was to apply the "national public policy" against discrimination as set forth in *Green* to prohibit racial discrimination in social clubs.

The *Green* decision is also consistent with other Supreme Court cases which prohibit racial discrimination in public and private schools. For example, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Supreme Court held that the state of Mississippi could not constitutionally give free textbooks to racially discriminatory private schools. In the *Norwood* opinion, the court cited the *Green* case as an example of how it has consistently prohibited government aid to discriminatory private schools.

Similarly, in Runyon v. McCrary, 427 U.S. 160 (1976), the Court held that a proprietary, nonsectarian school which receives no Federal or state aid is prohibited by the 1966 Civil Rights Act from denying admission to blacks. The Runyon decision illustrates the Supreme Court's affirmance of the strong public policy against racial discrimination in private schools. Taken together, these cases reflect a strong line of judicial authority invoking various constitutional, statutory and public policy doctrines which support the Service's interpretation that the law does not permit nonreligious private schools which discriminate to maintain tax exemption.

The Green court was not faced with the specific issue of whether the Service has the authority to deny tax exemption to religious private schools which practice racial discrimination as a tenet of their religion. However, the court indicated in dictum that the Service may have this power under the rule established in Mormon Church v. United States, 136 U.S. 1 (1890), in which the Supreme Court held that the religiously motivated practice of polygamy was subject to governmental prohibition since it violated Federal public policy.

In two recent decisions, the Fourth Circuit has applied the rationale of the Green decision to deny tax exemption to religious schools that practice racial discrimination as part of their religious doctrine. One case involved Bob Jones University, a religious educational institution which adheres to its religious belief forbidding interracial dating and marriage by (1) denying admissions to any individual, black or white, known to be a partner in an interracial couple, and (2) expelling any student, black or white, who dates or marries outside his race, or who espouses or encourages interracial dating or marriage. In Bob Jones University v. United States, 468 F. Supp. 890 (D.S.C. 1978), rev'd. 639 F.2d 147 (4th Cir. 1980), cert. granted ___ U.S. ___ (October 13, 1981), the district court interpreted Section 501(c)(3) as granting exemption to seven separate enumerated categories of organizations (religious, charitable, scientific, testing for public safety, literary, educational, or to foster amateur sports competition) and ruled that Bob Jones was a "religious" organization and thus was entitled to exemption without regard to whether it was charitable.

In a well-reasoned opinion that presented both sides and recognized the difficulties of the issues, the Fourth Circuit reversed the district court and held that Bob Jones was not entitled to exemption. It first rejected the lower court interpretation that the categories for exemption in Section 501(c)(3) are separate and thus that a religious organization may be entitled to exemption without being "charitable". It held that such a "simplistic reading of the statute . . . tears section 501(c)(3) from its roots." This interpretation was also rejected by the Green court, which observed that such an interpretation would mean that an organization such as "Fagin's School for Pickpockets" would be entitled to exemption.

The court then addressed the First Amendment issues. It rejected the University's contention that the nondiscrimination policy violated the Free Exercise clause because it forces a discriminatory religious school to forego a valuable benefit (tax exemption) in order to practice its religious beliefs. The court noted that the Service's policy would not prevent the University from teaching its doctrine or force any student to violate his beliefs.

The court also rejected the University's argument that the nondiscrimination policy violates the Establishment clause because it advances religions that do not practice discrimination and results in excessive government entanglement with religions. The court determined that the policy has a secular purpose that neither advances nor inhibits religion, and that uniform application of the rule to all religious schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of a sincere religious belief.

A different panel of judges on the Fourth Circuit applied the Bob Jones rationale to deny tax exemption to Goldsboro Christian Schools in Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd in an unpublished opinion (4th Cir. February 24, 1981), cert. granted, ___ U.S. ___ (October 13, 1981). These cases, along with the dictum in Green concerning religious schools, provide clear support for the Service's interpretation that Section 501(c)(3) does not permit a discriminatory private school, even one that discriminates on religious grounds, to receive tax exemption. However, I recognize that the issue with respect to religious schools involves a delicate balancing of constitutional doctrines, and the definitive answer should be provided by the Supreme Court.[6] As noted above, the appeals of Bob Jones and Goldsboro are now pending before the Supreme Court, where they belong; yet the Administration is now seeking to preclude Supreme Court consideration of the issue.

III. Impact of Recent Administration Action On Private Schools

The Administration's recent actions have implications for all three branches of government. First, with respect to Congress, the Administration has said that the Service has "no authority" to deny tax exemption to discriminatory schools, and has asked Congress to pass legislation to provide such authority. This interpretation is patently incorrect; indeed, there is no legal basis for the Service -- the agency charged with enforcement of the tax laws -- to take any other position.

6/ Indeed, in September, 1981, the Justice Department filed a memorandum in the Supreme Court supporting the legality of the Service's actions but asking the Court to accept certiorari of Bob Jones and Goldsboro Christian Schools in order to "dispel the uncertainty surrounding the propriety of the Service's ruling position and foster greater compliance on the part of the affected institutions."

In my view, the proposed legislation is unnecessary since it would merely confirm the correctness of the Service's and the courts' interpretation of the law. Legislation would be needed only if Congress wanted to change existing law to permit discriminatory schools to receive tax exemption. Indeed, if Congress acts on the proposed legislation it will unavoidably cast doubt on the validity of the Green decision. Moreover, proponents of discrimination in private schools would undoubtably use the legislative process to raise unrelated issues such as sex discrimination in an attempt to delay or avoid compliance with the law.

Although I do not believe the proposed legislation is needed, I will briefly comment on several problems with the language in H.R. 5313, the Administration's bill. As an initial matter, the bill does not provide guidance or criteria pursuant to which the Service could determine whether a school is nondiscriminatory. In addition, the bill's focus on whether a school has "refused" to act in a nondiscriminatory manner is ambiguous: must the school actually refuse to admit a black in order to be in violation or is the legislation directed at the intent to discriminate as well?

I also note in general that the draft does not distinguish between impermissible racial discrimination and permissible private philanthropy which benefits limited classes (such as scholarship programs for blacks). (The term "affirmative action" in the context of private charities would be a misnomer, since trusts to benefit the disadvantaged or oppressed classes are the very essence of charity.) If Congress decides to enact legislation along the lines proposed by the Administration, it should make it clear that the legislation sets a special rule with respect to invidious racial discrimination and not a general policy which could undermine desirable charitable activities.

Finally, although the Administration has stated that its proposed legislation is "sensitive to the needs of" religious schools in that it permits them to grant preferences in admissions to members of the religion, it would do nothing to resolve the basic constitutional issues involving racially discriminatory religious schools. Spokesmen for Bob Jones and Goldsboro have conceded that if enacted, the proposed legislation in its present form would result in denial of tax exemption to both schools. However, the First Amendment issues raised by those schools, which are presently before the Supreme Court, would remain unresolved.7/

7/ Bob Jones University has attempted to litigate the constitutional issues with respect to religious schools for more than a decade. In 1971, it filed an action in the U.S. District Court for the District of South Carolina, to enjoin the IRS from revoking its tax-exempt status. That suit culminated in Bob Jones University v. Simon, 416 U.S. 725 (1974), in which the U.S. Supreme Court held that the University was precluded by the Anti-Injunction Act from maintaining such an action, but suggested a refund suit as a means of access to judicial review. The University then paid a disputed tax and instituted a suit for refund which is now before the Supreme Court.

Presumably, if the Supreme Court accepts the Administration's motion to declare those cases moot, Bob Jones and Goldsboro would then need to return to the courts, beginning at the lower court level, to again seek judicial resolution of the First Amendment issues. This would result in additional expense and delay for all parties to the litigation. By temporarily granting those schools exemption while at the same time seeking legislation which would deny that exemption retroactively, the Administration is attempting to manipulate the judicial process, and to deprive both the Internal Revenue Service and religious schools of a timely resolution of the issues. I believe the Administration should withdraw its motion that the cases be dismissed as moot, and permit the critical constitutional issues to be resolved now in the Supreme Court.

It should also be noted that if the Supreme Court dismisses these cases as moot, presumably the government's counterclaim against Bob Jones for more than $400,000 in back taxes would be dismissed. Yet, at the same time the Administration proposes to retroactively deny tax exemption to all racially discriminatory schools, effective July 9, 1970. Why should Bob Jones receive a benefit (dismissal of counterclaim for back taxes) that all other schools similarly situated may be denied?

Role of the Internal Revenue Service

The Administration's statement that the Service's denial of exemption to discriminatory schools was an attempt to "govern through administrative fiat" has called into question the fundamental integrity of the tax system. This characterization is totally inaccurate. Indeed, the Service's 1970 decision was made at the highest levels of the Nixon Administration with the concurrence of the President, at a time when the Service was under preliminary injunction to deny exemption to discriminatory schools in Mississippi. On July 10, 1970, the White House issued a statement that "the President approves of and concurs in the IRS decision regarding tax exemption for discriminatory private schools". This decision has been followed for eleven years by both Republican and Democratic Administrations. Moreover, the correctness of that decision has been confirmed by the Supreme Court, endorsed by Congress, and accepted by federal courts across the country.

The duty of the Internal Revenue Service is not to make public policy but rather to enforce the tax laws as promulgated by Congress and interpreted by the courts. In the course of carrying out this duty, it makes countless determinations as to the scope and application of the tax laws, including for example diverse questions as to methods of accounting, corporate reorganizations, depreciation deductions and whether an organization is legally entitled to exemption under Section 501(c)(3).

In order to discharge its duty to enforce and promote compliance with the tax laws in an even-handed manner, the Service is required to promulgate guidelines that inform the public as well as revenue agents as to how the Service interprets the law. Congress cannot be expected to enact legislation which is specific enough to focus on the facts and circumstances of each particular situation. The area of private schools is no different from any other area of the tax laws in this respect, and the Service has attempted over the past to adopt and publish guidelines as to criteria it will consider in determining whether the nondiscrimination requirement is met.

The Services's early guidelines focused on publicity, reporting and recordkeeping requirements.[8/] However, experience showed that those guidelines only prohibited private schools from maintaining a formal policy of discrimination, and did not consider whether they in fact discriminated. Indeed, in 1978 Commissioner Kurtz observed that some private schools that were adjudicated to be discriminatory were nevertheless able to maintain exemption through compliance with the Service's existing rules. It was in recognition of the need for more guidance that the Service took the unusual procedual step in 1978 of publishing in proposed form, for public comments, a revenue procedure that would set forth more specific

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[8/] See, e.g., Rev. Proc. 75-50, 1975-2 C.B. 587.

criteria for determining whether a school is discriminatory. The guidelines in the proposed procedure were derived primarily from the criteria set forth in the injunction issued by the Green court and the standards applied by the Supreme Court in Norwood v. Harrison. Thus, for example, the guidelines applied generally to private schools adjudicated to be discriminatory (so-called "adjudicated schools") or formed or substantially expanded contemporaneously with a desegregation order in the community (so-called "reviewable schools"). Such schools were treated as "prima facie" discriminatory and could avoid revocation of exemption only by meeting certain mechanical tests. The procedure also provided that in "appropriate" but unspecified cases, the guidelines could be applied to other schools.

The Service held public hearings at which more than 250 witnesses (including several members of Congress) testified on the proposed procedure, and received more than 125,000 written comments. Many expressed concern about the treatment of reviewable schools under the proposed procedure. While it was considered appropriate for the Internal Revenue Service to shift the burden of proof in cases of adjudicated schools, there was some doubt as to the fairness of the proposed guidelines as they would apply to the reviewable schools, since the mere "point in time" at which a school was formed or substantially expanded may be an arbitrary criterion by which to assess whether it has discriminatory practices.

In addition, many objected to the "mechanical" nature of the tests, and raised problems that would be created for some church-related schools, schools for the handicapped and other "special" schools. In those cases, it might be difficult if not impossible for such schools to meet the mechanical tests, although the schools did not intend to be discriminatory.

The Service took these and the other comments into consideration and again published, for public comment, a revised proposed procedure in February, 1979. The revised procedure modified the guidelines substantially to eliminate the "prima facie" presumption and mechanical tests and provided relief to certain denominational schools which do not have a racial discriminatory practice but may not attract minorities because of their ethnic focus. In addition, it provided for National Office appeals and review in order to ensure uniform application of the criteria. Although some may disagree with the proposed guidelines, the Service is to be commended on the procedures it followed in publishing proposed rules, soliciting comments, then publishing revised rules which took into account many of those comments and attempted to formulate even-handed, workable guidelines.

I want to clarify one final issue with respect to the Service's authority in the private school area. The Administration's recent announcement stated that

> The Treasury Department has concluded that this kind of judgment [to deny tax exemption]--which may mean life or death for certain organizations--is fundamentally a question for Congress.

This statement ignores the fact that in response to the Supreme Court's recommendation in the 1974 Bob Jones decision, Congress enacted legislation in 1976 permitting an organization denied exemption by the Service to seek a declaratory judgment in either the Tax Court, the Court of Claims or the United States District Court for the District of Columbia as to the correctness of the Service's determination. The purpose of the legislation was to give organizations an expeditious right to judicial review as a "check" against possible mistakes in interpretation or even abuse of the exemption process by the Service. Under the legislation, an organization whose exemption is denied or revoked has ninety days to file a declaratory judgment action. In addition, to prevent the Service from simply delaying consideration of an exemption application, an organization may also file an action if the Service has neither granted nor denied exemption within 270 days after application. In cases involving proposed revocation, the legislation permits the organization to continue to receive tax deductible contributions up to $1,000 per donee pending the court's ruling.

Many organizations have won exemption by challenging the Service's determination on a declaratory judgment action; indeed, I understand that five private schools in Mississippi denied exemption by the Service under the Green criteria have instituted declaratory judgment actions to litigate their claimed right to exemption. The Treasury Department apparently overlooked the availability of the declaratory judgment remedy when it asserted that the Service has a power of "life or death" over would-be exempt organizations.

IV. How to Achieve Uniform National Policy on Racial Discrimination

The Administration's actions now highlight a problem that has confronted the Service, Congress and the courts in recent years: how can we achieve a uniform national policy with respect to discrimination in private schools? Since October 1, 1979, Congress has in effect prohibited the Service through appropriations riders from formulating any guidelines that go beyond existing ruling in setting standards of nondiscrimination for private schools. However, those standards are clearly inadequate since private schools adjudicated to be discriminatory in federal courts have been able to maintain tax exemption by adopting "paper" policies of nondiscrimination. The plaintiffs in Green reopened the original litigation in 1976 to challenge the Service's enforcement of the 1971 injunction, and the district court recognized the inadequacy of the Service's existing standards and established new criteria for the Service to follow in determining whether Mississippi schools are discriminatory.

As a result of the conflict between the Green decision and the appropriations riders, the Service is currently operating under one standard for Mississippi schools and another standard for all others. This creates unfair distinctions among schools throughout the nation and effectively precludes even-handed enforcement of the law by the Internal Revenue Service.

Some commentators have suggested that the Service should undertake a more vigorous audit policy which would involve a case-by-case determination of whether a particular school is discriminatory. However, stepped-up audit enforcement alone will not ensure that all private schools will be judged by the same criteria by revenue agents in the field. What is needed is a uniform set of standards that will guide both revenue agents charged with enforcement of the tax laws and private schools seeking to comply with the law and thus maintain tax exemption. Indeed, such guidelines could preclude the need for intensive examination of schools who demonstrate voluntary compliance by meeting specified criteria.

The question is how to achieve such uniform standards. There are three possibilities. First, the appropriations riders clearly do not provide the necessary guidance and should be repealed or allowed to lapse. Congress could legislate substantive guidelines provided they are consistent with the constitutional prohibitions against racial discrimination. However, this would unnecessarily involve Congress in what amounts to a regulatory process that the Internal Revenue Service has the personnel, expertise and technical capacity to perform. If Congress subsequently determines that the Service's interpretation of what the law requires is incorrect, it may then intervene to provide substantive legislation.

Another possible source is the courts. The case of Wright v. Regan, 490 F.Supp. 790 (D.D.C. 1979), rev'd 656 F.2d 820 (D.C. Cir. 1981), is currently pending on petition for certiorari before the Supreme Court on a standing question; in that case, the plaintiffs have asked the courts to extend the Green injunction to the nation as a whole. If the standing issue is resolved favorably to the plaintiffs, a decision on the merits may provide guidance. In addition, these issues may be addressed if the Supreme Court decides the Goldsboro and Bob Jones cases, and any legislative action should clearly await Supreme Court review of the First Amendment issues. However, it is at best uncertain whether judicial guidelines will be provided, and if so, whether they will be sufficient to give both revenue agents and private schools the guidance that is needed.

The obvious source of guidelines is the Service. This is appropriate since the Service already has substantial experience in auditing private schools and could bring this experience to bear in formulating standards that would be workable for audit purposes. Moreover, it is the agency that will ultimately be responsible for carrying out the standards, and it received substantial guidance from private schools, members of Congress and the public as to the appropriateness and equity of particular guidelines in its experience with the proposed revenue procedures in 1978 and 1979. The second proposed procedure reflected an effort to reach a reasonable balance and achieve even-handed, equitable guidelines. By providing for National Office review of proposed revocation or denial cases, the Service attempted to ensure that each affected school would receive consideration at the highest administrative levels.

I believe that Congress should permit the Service to formulate and issue new guidelines; in view of the sensitivity of the situation the Service should first publish the guidelines for public comment, as it did with the proposed revenue procedures in 1978 and 1979. This would give all interested parties, including the private schools and members of Congress, an opportunity to study and comment on the proposed guidelines. The Service should then be given an opportunity to make changes in light of the comments, then adopt and implement guidelines.

The implementation of the tax laws is an evoluntionary process. Only time and experience will demonstrate whether guidelines that the Service may adopt are reasonable and equitable. However, there are "checks and balances" within the system if the Service goes too far. First, Congress clearly has the power to intervene and legislate if it finds that the Service's rules are inequitable and contrary to the intent of the law. Second, under the declaratory judgment procedures, a private school may challenge denial of exemption in the Tax Court, the Court of Claims or the United States District Court in the District of Columbia. The declaratory judgment remedy was enacted in order to provide an important safeguard for charitable organizations and grants them the right to an expeditious judicial review of an adverse IRS determination. If Congress is concerned that the Service may have too much authority to deny exemption on public policy grounds, it should consider liberalizing the declaratory judgment remedy to give exempt organizations challenging denial of exemption on racial discrimination or other public policy grounds easier access to the courts to review the reasonableness of IRS actions.

IV. Summary

Since the decision of Brown v. Board of Education in 1954, Congress, the courts and the executive branch have united to work toward eradication of racial discrimination in education. The law is clear: a private school that engages in racial discrimination is not entitled to exemption. The Administration's recent actions have had the unfortunate effect of appearing to favor racial discrimination in a manner that is harmful to national public policy and repugnant to most Americans. To extricate itself from this politically damaging position, the Administration is now seeking to place an unnecessary burden on Congress to adopt legislation that merely says that the law is the law.

I believe Congress can best contribute to a solution by refusing to enact the Administration's bill and adopting a resolution such as that proposed by Senator Hart which makes it clear that Congress views the proposed legislation as unnecessary since it would merely confirm the existing law. In addition, Congress should eliminate the appropriations riders which now stay the Service's hand, and permit the Service to issue guidelines as to whether a private school will be considered discriminatory. Such guidelines would enable the Service to achieve even-handed enforcement of the tax laws and would provide substantive guidance for private schools who wish to comply with the law.

The Administration has also attempted to use the exemption process as a means to manipulate the Supreme Court's decision to hear the appeals of Bob Jones and Goldsboro. This action achieves nothing and will cost all parties to the litigation needless delay and expense since the First Amendment issue can ultimately be resolved only by the Supreme Court. The Administration's petition to vacate the appeal on grounds of mootness is unwise and should be withdrawn.

A final word about private charity seems appropriate. The tax laws foster private charity precisely because it can benefit narrower classes than is thought appropriate for government-sponsored benefits. Tax benefits encourage diversity, and should do so. Public policy intervenes only in the most extreme cases, and the fostering of racial discrimination is one such very rare case. A philanthropist who wishes to endow a racially discriminatory institution is free in our society to do so. But he need not receive, or expect, a tax subsidy, however sincerely his action may be based on his personal beliefs.

Chairman ROSTENKOWSKI. Thank you, Professor Sanders.

I would like to take this opportunity to thank all of you for your indepth review of a very important subject. I certainly want to express the gratitude of the committee. It has been educational as well as rewarding.

I understand, gentlemen, that you received the administration's briefs prepared in support of their new policy in this area. Is that correct?

Mr. TRIBE. That is correct.

Chairman ROSTENKOWSKI. Would you care to comment on the legal sufficiency of these briefs?

Mr. TRIBE. I spent much of last night reading them, hoping to find some enlightenment in them. I am afraid that I was rather disappointed. There are, to begin with, several key matters on which no legal arguments at all are made. I suppose the most important one is what in the world are they doing? That is, even if they are right in their view of the law, not a word is said—by Deputy Attorney General Schmults in his statement of February 1, by Assistant Attorney General Reynolds in the lengthy January 29 draft, in the supporting memorandum of Cooper and Cool—not a word is said in any of those documents to explain why the natural consequence shouldn't be simply letting the Supreme Court resolve the matter.

Second, and I was rather surprised about this, no argument at all is offered to support the position that the first amendment somehow gives schools like Bob Jones or Goldsboro a special right. One of the memorandums says there is a serious question here, but one would have thought that, if the administration has nothing more to say on it than that, that in itself would be a compelling reason to ask the Supreme Court to rule.

Third, nothing is said—no legal argument whatever is offered—to explain the administration's remarkably lackadaisical and casual view of courts and what they do. Deputy Attorney General Schmults dismisses all of the precedents as examples of "judicial activism," giving them the back of his hand. Well, you may not agree with what some of the courts have ruled, but I hadn't thought, even when the Attorney General delivered his broadside against the judiciary, that what was meant was that the administration now proposes simply to disregard judicial decrees and declaratory judgments that they think are unwise. It is a remarkable performance.

Now, apart from the silence of all of these memos with respect to these several crucial issues, I tried to figure out why it was that they found the judicial precedents unpersuasive, and I must say the arguments were rather stunning. At one point, recognizing evidently that more was needed than simply a conclusory characterization of these decisions as "activist," the deputy attorney general proceeds to misquote the Supreme Court's 1974 decision in *Bob Jones* v. *Simon*, on page 14 of his draft testimony.

He claims that the Supreme Court in 1974 called its earlier summary affirmance in *Coit* v. *Green* a decision with "no binding significance." That is simply false. The Court said nothing of the sort. All it said was that, because this was a summary decision, not in an adversary context, it was of limited precedential value. At least the Assistant Attorney General, Mr. Reynolds, is more truthful about that. He says that is what was involved, but again it is utterly irrelevant, because as the Supreme Court quite explicitly held in 1975 in the case of *Hicks* v. *Miranda*, lower courts, and certainly officials of the executive branch, are every bit as bound by a one line summary decision of the Supreme Court as they are by a 200-page opinion.

The only relevance of the Court's 1974 observation that that *Coit* decision was of limited precedential effect was to explain that it might itself feel free to overrule it. That is, of course, why the Court thought there was something to consider in granting cert in the *Bob Jones* case. But the fact that the Supreme Court of the United States, ever since *Marbury* v. *Madison* has had the last word on contested issues of law and doesn't feel totally bound by its own one-line decisions certainly doesn't mean that Mr. Reynolds or Mr. Schmults are free similarly to disregard and show disdain for decisions of the United States Supreme Court.

Indeed, the Supreme Court itself, as Dean Rosenthal pointed out, relied on the *Coit* precedent in *Norwood* v. *Harrison*. But *Norwood* v. *Harrison*, these legal memos tell us, is distinguishable. It is a different kind of case. But the distinctions that are offered are pretty ridiculous.

One that especially struck me by the Assistant Attorney General was that *Norwood* involved tax-supported books being given to schools; and books are available in the marketplace, whereas tax breaks of the kind involved in these cases are not available in the marketplace.

Well, so what? Certainly it does not mean anything. I think that the legal analysis really is distressing.

Now the Department of Justice memos next tried to look to various things that Congress has done apart from enacting 501(c)(3) and 107(c)(2). They seek to weave a fabric of congressional disapproval of this decade-long practice. Again the arguments are rather pathetic.

First of all, the assistant attorney general asserts that, because title VI makes it possible to cut off Federal funds from these schools, and because the Civil Rights Act of 1866 makes it possible to sue them, it follows that the extraordinary remedy of taking away their luxurious tax benefits is unavailable, because there are these other remedies.

That is utterly illogical, I am afraid. If anything, these other laws show that there is a strong national policy against even private racial segregation. It is illegal, after all.

The Assistant Attorney General then argues that what Congress did in 1976 with respect to social clubs also supports the administration's new-found position on racial segregation, because Congress in section 501(i) didn't say anything about schools.

Well, of course it didn't. It was reversing a decision of a district court that had nothing to do with schools. It had to do with social clubs. The fact is that both the House and the Senate, in their reports on the subject, took as the norm the rule that if you are a school, and if you segregate, then you can't get tax benefits, and they were trying to conform the law of social clubs to include schools.

Chairman ROSTENKOWSKI. Thank you, Professor. Unfortunately, our time is limited.

Mr. TRIBE. It goes on. I just can't find any legal argument that is worthy of the name in those briefs.

Chairman ROSTENKOWSKI. Mr. Conable will inquire.

Mr. CONABLE. Professor Tribe, I don't pretend to be a constitutional philosopher or anything else, but I am somewhat disturbed by some of your rhetoric about tax exemption being a grant to the benefiting institution. How do you square that with the separation of church and state, the establishment provision in the Constitution?

It seems to me that that rhetoric will get you in bad trouble with the churches, who like to feel that they are not receiving grants, but that they have a separate identity that protects them.

Mr. TRIBE. I think that is an important question, and I think the answer depends on the nature of the tax benefit. Certainly when the Government simply refrains from taxing twice as much of one's money, it would be unfair to call that a grant because that would assume somehow that the Government owns it all to begin with.

Mr. CONABLE. If I may interrupt, we have had a lot of discussion of what a tax expenditure is here, whether everything belongs to the people unless we tax it away, or whether it belongs to Government, unless we give people an exemption. That is why I am coming at this once again.

Mr. TRIBE. Right. It is a tough issue, but I think using labels like tax expenditure might not help us. I think the point is that when you have some general theory of what it is you are taxing, like net income, then things that fit within that theory, and that are deductible because, for instance, they are used to help produce that income, ought not to be regarded as a gratuity by the Government; but when you go out of your way to depart from the theory, and you say that a particular contribution to an enterprise, even though it is not an income-producing expense, ought to be reinforced by a tax deduction, then—whether you call it a "grant" or not—the question arises: Is it permissible for the Government which does not automatically allow contributions to be deducted independent of the nature of the recipient to treat a racially segregated recipient as doing a terrific job for society?

Now there is a red herring in the whole thing when the Attorney General's Office argues that an educational institution or a religious institution need not also be "charitable." The word "or" is found in the provision, and I think there is a lot in that argument. I think the fourth circuit might have gone too far in saying it was simplistic. But it is not really relevant because there is no principle that, whenever something happens to "teach," those who contribute to it can get a deduction. What about a school that teaches murder? We are certainly not going to allow a deduction for that. A governmental decision that says, "Well, it is terrible to teach murder but it is OK to practice racism," is a governmental decision that is not itself neutral with respect to race. That is really the point.

I was astounded to find, in the staff memorandum to the Assistant Attorney General, the argument that a little racial segregation isn't all that bad, in the sense that it doesn't prevent the institution, on balance from being a wonder to behold and a terrific boon to society.

I was also upset by the testimony of Mr. McNamar, Deputy Secretary of the Treasury, when he took the position that racism, after all, is no different from any other aberration of our society, and that you can't really distinguish it. He asked: "Once you start saying that institutions that segregate by race are not entitled to special tax breaks, then where can you stop?" I would have thought that the history of this country, if it teaches us anything, teaches us that problems of race are unique, and one doesn't really have to resolve all of the genuinely tough questions about drawing the line about tax expenditures to recognize that, since we allow deductions in these areas only after judging that a truly beneficial social service is being performed by the institution, and if we then insist on treating an admittedly segregated institution as performing a valuable social service, we will be insulting and stimatizing and denigrating the minorities in this society. That is not consistent with the Constitution or with the Internal Revenue Code.

Mr. CONABLE. I think my time is just about up. We have had a lot of trouble in this committee with the Christian ethics case. I realize that is not the issue here.

Mr. TRIBE. That is the political lobbying?

Mr. CONABLE. That was a decision that denied Billy Joe Hargis tax exemption on the grounds that he wasn't a church. The churches have never accepted this, and we have had an extremely difficult time with it, because it draws the issue of whether Caesar can decide what are the things of God and what are not. I acknowledge that that is not directly on point here, but I was reacting some to your rhetoric about the Federal assistance you find on the exemption side.

Mr. TRIBE. I think neutral assistance is fine. Police and fire protection assists churches, too, but it is part of a neutral program. Problems would arise if one said that churches, just because they are churches, could get a tax break that other institutions that might practice racial discrimination cannot get.

One of the deepest problems in this whole area is that some people propose departing from a neutral standard and say that, even though we cannot give special tax favors to discriminatory schools, we must do so if discrimination is part of their religion. That kind of line is the one that would get us into trouble, I think.

Chairman ROSTENKOWSKI. Mr. Gibbons will inquire.

Mr. GIBBONS. Mr. Chairman, I have, I think, two questions, and I hope that they will elicit short answers. I will try to phrase them that way.

Let me say, Mr. Chairman, first of all to you, I commend you for calling these hearings. This is an important subject, one that will not be soon resolved, and one that will just not go away. I know from my experience in chairing hearings 2 years ago of an oversight nature on this subject that this is a subject matter in which feelings are deeply held, in which the law and the Constitution are bringing together some of the most vital parts of our Constitution and some of the most strongly held beliefs that we have.

I am already beginning to receive large volumes of mail this time mainly from the churches involving this, church-related people. I came to the conclusion 2 years ago that this was a thicket that the Congress shouldn't get into, that we ought to allow the courts to work it out as best they could, and that it was not the kind of thing that Congress was really designed, because of the state of the law, to try to solve.

The subcommittee met many times to discuss these issues, and while we took no formal votes and we came to no formal conclusions, that I think was the consensus of what we came to.

Now let me ask you what is the state of the law as it is today? Is there a need for Congress to act other than perhaps to allow the restrictions on the appropriations bills to expire? Is there a need for Congress to enact any affirmative law?

Mr. TRIBE. I can be brief. No. I think not.

Mr. ROSENTHAL. May I also say no.

Mr. SANDERS. I agree, there is no need to act.

Mr. GIBBONS. What, then, and I hope we can be brief about this because this is—what should the administration do now?

Mr. TRIBE. I doubt that they would take my advice after I have offered some of my views about the quality of their work, but I guess what they ought to do is just "fess up" that they've blown it. They thought they could achieve a very complex, subtle mix of political objectives, but the law got in the way. I think they ought to simply admit it, and say that, in the current state of the law, they have got to proceed in the U.S. Supreme Court.

I guess it is up to them whether to decide to defend the fourth circuit rulings as they were going to do up until the end of the year, or to attack them. But I think this whole elaborate charade of pulling things out from one court and into another and trying to patch things up is getting them nowhere and is occupying valuable time of the Congress and of the courts.

Mr. GIBBONS. Do you think they should go back to the Supreme Court, confess their errors and try the case?

Mr. TRIBE. And proceed to argue whatever they think the law is in this area. I suppose these memorandums have somehow convinced them, although I can't figure out how, that the law is not what all these appellate courts have thought, or what Congress has thought. If they really believe that, let them try it out on the Justices. They are waiting.

Mr. GIBBONS. What do you say, Mr. Rosenthal?

Mr. ROSENTHAL. I feel the same way. In legal education, both professors and students are constantly learning from one another. I don't think there is anything to be embarrassed about when one says I know more today than I did yesterday and I made a mistake and I'm sorry. And I think that is exactly what they ought to do.

Mr. SANDERS. I agree. Let the Supreme Court hear the *Bob Jones* and *Goldsboro* case. That is their job. They are fully equipped to give us guidance in this area, and only after we hear from the Supreme Court on that case and the *Wright* v. *Regan* case, then it may be necessary to provide additional guidance. During the interim, let the Internal Revenue Service do its job. It is fully equipped to do it, and it is the best place. Ultimately it is going to be their responsibility. They have the agents, and they proved in the handling of the 1978 and 1979 revenue procedures, which were published in proposed form, after listening to hundreds, if not thousands—receiving over 125,000 written comments—and then made changes. Let them do their job.

Chairman **Rostenkowski**. Mr. Rangel will inquire.

Mr. **Rangel**. Thank you, Mr. Chairman. I will be brief. Because this has been characterized as a possible mistake or political blunder, I would like to propose a hypothesis where the executive branch wants to achieve a political objective, one that had been consistent with the candidate's campaign, and in order to achieve this objective, the executive branch reached out to the agencies and departments involved, and asked whether or not this objective could be obtained legally.

It was advised, not only had the Congress spoken statutorily, but that the Judiciary had also interpreted the law so that any act toward achieving this objective, this political objective, would in fact not be a political blunder, but would be in violation of existing statutory case law, and if in fact the executive was so informed by those people that have that responsibility, but did in fact direct them to draft statements that were contrary to existing law, then what is left for the legislative branch of government, if, in fact, this hypothesis were presented to it?

Mr. Tribe?

Mr. **Tribe**. You are viewing this as a hypothetical case rather than as a description of the current scene?

Mr. **Rangel**. Well, having served on the Judiciary Committee, I would rather say that if in fact the executive acts contrary to existing law——

Mr. **Tribe**. There is a constitutional problem. That is, they take an oath faithfully to execute the laws, and I suppose a short way of saying much of what I have said is that it is very clear to me, at least, that that oath has been violated by some people in this case.

They are not telling the truth either to the Congress or to the Supreme Court, and I think they ought to decide which one at least to be candid with. They are, I think, misrepresenting the law in a serious way, and they are coming very close to engaging in outright defiance of the District Court for the District of Columbia. I suppose much more investigation is needed before anyone can say with confidence what really lay at the bottom of it, but I do think that, if any of us left the impression that for the administration simply to apologize and move on with business as usual would leave no further serious issue, I think that is not the impression that I, at least, want to leave.

I think there are serious questions of abuse of power here that cannot be erased. The clock does not move backward in this or any other administration. What is done is done, and I think what is done is something that must be answered for.

Mr. **Rangel**. Mr. Rosenthal?

Mr. **Rosenthal**. I agree with Mr. Tribe. Certainly, this is not one of the legal profession's finest hours. I would leave it up to Congress what to do except to urge you not to fall into the trap that the administration seems to be setting of embarking on a program of trying to adopt this legislation that they have proposed and getting caught in that kind of rat race. There are several other ways, whether by a resolution or a vote of censure or whatever else you think appropriate, I think this committee has much better judgment on that issue than I would have.

Mr. **Rangel**. I guess my question is if the executive continuously directed his people to do something contrary to the U.S. Supreme Court, contrary to the Federal courts and contrary to the interpretation of statutes passed by this Congress, what do we do?

Mr. **Rosenthal**. Well, you have a precedent in 1974. I don't think we are very close to that.

Mr. **Rangel**. Mr. Sanders?

Mr. **Sanders**. That is why it is important for the *Bob Jones* case to be heard in the Supreme Court. I am also concerned that if Congress embarks on legislation and fails, the administation could use that as an argument in not enforcing the present law.

I have one comment about the Justice Department's arguments. I have very serious problems in understanding the statutory interpretation and legal judgments.

Finally, I am concerned about the very integrity of our tax system in view of the actions of this administration. I think they have made a serious mistake.

Mr. **Rangel**. Thank you.

Chairman **Rostenkowski**. Mr. Stark will inquire.

Mr. **Stark**. Thank you, Mr. Chairman. I want to thank the panel as somebody who has tried to review this without the benefit of a legal education. I would like to ask a couple of questions that maybe you could put before me in simple answers.

I didn't hear from Dr. Rosenthal and Mr. Sanders in terms of what they felt about the memo, the legal memo supporting the administration's actions, and I guess I would ask you, because Mr. Tribe gave us a detailed answer: If you were grading that memo in a legal writing class, or as a law school exercise, what letter grade would you give to that memo?

Mr. **Rosenthal**. I am sorry, I have to pass. I have not read them, and consider myself lucky, I guess.

Mr. **Sanders**. I think it is an attempt to put together a lot of boilerplate law and try to reach a conclusion. I think it breaks down in a number of respects. The argument that the various seven categories under section 501(c)(3) are in the disjunctive, and thus you can read out public policy in the law of charitable trusts and common law, in the *Bob Jones* case itself, the appeals court said, "This simplistic reading of the statute tears section 501(c)(3) from its very roots."

In analyzing the statutory construction, the administration ignored section 170, which is specifically entitled "Charitable," included in the title of section 170, which brings in the background of charitable trusts and common law.

Mr. **Stark**. But what grade, A to F?

Mr. **Sanders**. I would give it probably an F.

Mr. **Stark**. Would you feel any differently in your grading, and I would assume that Professor Tribe would grade it somewhere at the higher than the F area?

Mr. **Tribe**. No, I am afraid I am much more lenient than my colleague, but I am behind schedule in grading my 250 constitutional law exams now, and I could hardly justify giving priority to this stuff.

Mr. **Stark**. One of the authors of that memo sent a memo earlier on to Mr. Starr in the Attorney General's Office, and they cited as a reason for making this change in the law a part of the Republican Party platform, which said: "We will halt the unconstitutional regulatory vendetta launched by Mr. Carter's IRS against independent schools."

Does that have any legal standing in terms of building a legal brief, the platform?

Mr. **Tribe**. The last time I read the Constitution it didn't give any status in law to the Democratic or Republican platforms.

Mr. **Stark**. Would any of you feel any differently if it cited part of the platform which says, "The Republican Party is determined to restore commonsense and quality to education for the sake of all students, especially those for whom learning is the highway to equal opportunity?"

Mr. **Tribe**. It sounds pleasant.

Mr. **Stark**. Professor Tribe touched on one thing. You said you couldn't give tax exemption to a school that advocates murder.

Mr. **Tribe**. I didn't say "advocates," but teaches people how to do it.

Mr. **Stark**. We were treated this morning in the press to a story which indicates that at the same time that this change was being considered for the Bob Jones University, the administration was considering giving a tax exemption to a Nazi group, the National Alliance, and originally they were denied their educational deduction because they advocated killing and murdering blacks and Jews.

Does the same kind of constitutional problem hit that case, and would they have to, in fact, violate the law if they were going to make the change that they were considering at that time?

Mr. **Tribe**. The key question is what practices are being indirectly supported or enforced by a tax exemption. The ideas, the beliefs that the group holds are sacrosanct. One can't deny exemption because you don't like the way someone's mind works, but it seems to me that denying an exemption because a group of people goes out and beats up on others, beats up on them either physically or emotionally by stigmatizing them as racially inferior, is a perfectly standard thing to do, and the contrary view really says that all of us, black and white alike, have to share some of our tax dollars with people who want to use them to beat up on others. I don't think there is any support in the law or in commonsense for that.

Mr. **Rosenthal**. I agree.

Mr. **Stark**. Mr. Sanders?

Mr. **Sanders**. Yes, this is consistent with the *Green* case and the interpretation of national public policy, which is a critical criteria that the IRS is ordered to take into consideration. In the case that you referred to regarding the Nazi organization, its actions are probably illegal and obviously against public policy, and so that organization would not be granted exemption.

Mr. **Stark**. Thank you very much.

Chairman **Rostenkowski**. Mr. Jacobs will inquire.

Mr. **Jacobs**. Thank you, Mr. Chairman.

Gentlemen, it is fairly clear that the courts agree with your testimony. Do you know of any legal scholars who don't?

Mr. **Tribe**. I must say I am unaware of any legal scholars who take a view that is congruent with that of the Justice Department. There is some writing by Boris Bittker, primarily, that is somewhat more reluctant to classify at least some tax exemptions as special benefits than I think I would be, but nothing that he has written, and nothing I have read by any other legal scholar, goes nearly as far as the approach taken by the Justice Department.

I can't swear to that, but I think that is the case.

Mr. **Jacobs**. Do other panelists agree with that, to your knowledge?

Mr. **Rosenthal**. No, I agree and I might suggest that as to a few doubtful statements may have appeared in legal literature early in the game, their authors would probably withdraw them today in the face of the history of the continued construction of this statute by both the courts and as a practical matter by Congress, and feel that whatever their original thoughts would have been, that they are no longer relevant after all of the 10 years of history.

Mr. **Jacobs**. Mr. Chairman, let the record show that this Member has determined that a general invitation to legal scholars has been published, and no one who holds contrary views has come forward to testify before the committee.

My only other question to the panel is with reference to the so-called Ashbrook amendment. Is it correct to say that those amendments deal with regulations by which racial discrimination is determined as distinguished from dealing with the fundamental policy of whether if in fact there is discrimination there ought not be or ought to be a tax exemption?

Mr. **Tribe**. I think that is correct.

Mr. **Jacobs**. Thank you. That ends my questions.

Chairman **Rostenkowski**. Mr. Crane will inquire.

Mr. **Crane**. Thank you, Mr. Chairman. This question is directed generally to the panel. Anyone can respond. In your reading of the Internal Revenue Code, particularly the language of section 501(c)(3) and also presumably in your understanding of any congressional debate that preceded that, is it your considered judgment that Congress intended that the IRS should make sure that any organization enjoying a tax-exempt status must pursue what is generally defined as national policy or public policy?

Mr. **Tribe**. I don't think I would quite put it that way, because that suggests that, by signing on the dotted line as a recipient of tax benefits, one is enlisted as a foot soldier in the national agenda.

That is not quite it, but I do think it is clear, from the history and structure of 501(c)(3) and 170(c)(2), that the negative side of that holds—namely, that, as a precondition of enjoying the special bonus from the public treasury that is involved in these provisions—one must at least show that one is not actively frustrating some fundamental, well-articulated, explicit national policy, such as the policy embodied in law against racial segregation.

Mr. **Crane**. Would you say advocacy of homosexuality is public policy?

Mr. **Tribe**. I guess advocacy under the first amendment is beyond the reach of public policy either way, and that one is free under the first amendment to advocate or to oppose any idea one pleases.

Mr. **Crane**. Would you say that pornography is public policy?

Mr. Tribe. Well, the Court has said that at least a certain kind of hard-core pornography, which Justice Stewart couldn't define but which he claimed he knew when he saw it, really isn't speech and it is not protected at all. So, at least in terms of current law under the first amendment, hard-core pornography is unprotected. I suppose this would mean that a tax exemption for someone who wants to peddle illegal obscene literature—even if not for a profit, but just for kicks—would be disallowed.

Mr. Crane. The reason I asked is there are organizations that have advocated that, and the courts have not attempted to dictate thus far that they should lose their tax-exempt status.

Mr. Tribe. But you are saying "advocate."

Mr. Crane. Because of strong positions that are not necessarily the most popular positions.

Mr. Sanders. May I interject for a moment? National public policy, which is the key word here, is based upon judicial decisions, legislation, consultation with the Justice Department, and the best lawyers in government. It is not a decision that is reached quickly or frivolously by the Commissioner of Internal Revenue, and public policy will intervene only in the most extreme case.

Racial discrimination in schools is clearly one of those cases.

Mr. Crane. In the absence of some kind of legislative guidelines as to what is public policy, when do we know public policy becomes public policy?

Mr. Tribe. It helps to read the Constitution on the subject. The equal protection clause is about as explicit as it could be in establishing that racism is against the fundamental law of the land. That is why this is such an easy case.

The hard boundaries of it arise when there are religious overlays, and that is what makes the *Bob Jones* and *Goldsboro* cases more troublesome. But the administration's approach, until they turned around, was to say that it is not permissible for the IRS to deny tax-exempt status to any discriminatory school, even a discriminatory school that has no plausible First Amendment claim at all.

Mr. Crane. I assume, Professor, that those judges in rendering *Plessey* v. *Ferguson* were conversant with the Constitution just as those who rendered *Brown* v. *Board of Education* were conversant with the Constitution.

Quite obviously public policy changes even in the interpretation of legal scholars with regard to what is the intent of the Constitution, is that not correct?

Mr. Tribe. I am certain that is correct, and I guess I would not be among those who would say that, just because all the judges and maybe all the legal scholars say something, that it has therefore got to be true. What is absolutely clear is that the executive branch isn't supposed to take the law into its own hands and just shovel it away and not proceed with a pending case in the Supreme Court to test its legal themes. It isn't the case, after all, that, if we were to revamp the system so that the Secretary of the Treasury or the Deputy Attorney General made the final decision, we would have less legal errors! We would certainly have a very different country from one in which we submit those contested questions to Judges. Judges can be wrong, too, but there are safeguards that makes that a more plausible place to answer these questions than in the office of William French Smith.

Mr. CRANE. It seems to me that you made an argument with that statement in behalf of that body in our Government; namely, the Congress, to assume the responsibility for absolutely determining policy. This is not a judicial responsibility any more than it is an administrative responsibility but a congressional one.

Mr. TRIBE. I guess I am having even more trouble with the word "policy" than I was earlier. It is, I think, a terrible understatement to say that it is simply "against the policy of the country" to treat black people as inferior. That is not a question of "policy" in the ordinary sense. It is a question of fundamental principle. It is not a question of tradeoffs, of more or less. It is a fundamental matter of principle.

Now, as to that kind of matter, I think Justice Jackson was right decades ago when he said that we have committed ourselves to a system that doesn't put those issues of equal human dignity up for popular vote. Although such issues may be controversial, and although judges may disagree about them, they are issues that we do not resolve in the polling booth. So the whole "policy" label, I think, is misleading.

We are talking here about the government actively endorsing and approving and supporting the treatment of black people as inferior. For anyone to say that this simply raises a policy question is not faithful to the 14th and 15th amendments.

Mr. CRANE. Thank you. My time is up. I don't think it is a question as you just stated, of necessarily treating people of one color or another as inferior. Discrimination does not necessarily convey that meaning.

Chairman ROSTENKOWSKI. I would like to make this observation which is probably as sensitive as the subject matter we are discussing. I am concerned about time constraints. We have another panel that is waiting to testify. So, I would ask the panelists to make their answers as brief as possible.

Mr. Downey may inquire.

Mr. DOWNEY. Thank you, Mr. Chairman.

Professor Tribe, in support of this argument that the statute must be amended, Schmults and McNamar stated that, "Otherwise there would be nothing to prohibit the Internal Revenue Service from determining that some other policy, such as sex discrimination, required revocation of tax-exempt status."

Would you respond to that, please?

Mr. TRIBE. I guess there are two points. First, I would stress, as Mr. Sanders stated, that there *is* something to prohibit it—namely, a process of declaratory and other judicial review, at which time the Service has to justify its judgments.

Second, I reject the argument that somewhere, somehow there is a way of avoiding all questions and all tough problems, that maybe a statute will do it, or maybe stripping the courts of jurisdiction will do it. The truth is—tough issues won't go away by magic.

It is like the pea hidden under one of several shells. These problems will not go away, and proposing a statute is just another way of moving the pea around. It is a waste of time.

Mr. **Downey**. Any member of the panel can answer this. What would be the effect of an attempt to enact legislation such as the administration has proposed that failed on cases like *Wright*, for instance, which pending before the Court now?

Could you give us some idea of what impact you think a failure might have?

Mr. **Tribe**. I suppose some people would argue that a failure implied that Congress didn't really agree with the precedents. Others would argue, I think more persuasively, that this would be an unfair interpretation.

A legislation effort may fail because people think no legislation is necessary. I think the deeper lesson is that there is only one way that this body can affect the law, and that is by passing a law, submitting it to the President for veto, and overriding the veto if he vetoes it.

All the other gimmicks—like the legislative veto gimmick, which I know is rather popular in Congress—or the resolution that memorializes people about the sense of the Congress, depart from the ideas of the framers as to how law is to be made.

Mr. **Sanders**. I am concerned that if Congress embarks upon legislation, as I said before, and fails, it will be read by the administration in such a way as to not allow the Commissioner of Internal Revenue to enforce these reasonable guidelines in effect.

We are going to end up with having the whole thing bogging down. That is the problem once you start.

Mr. **Rosenthal**. Might I add that this relates to the question Congressman Crane asked of Mr. Tribe before, about where we find policy, and of course we find policy in the Constitution. We also find it in the acts of Congress, and several of us have cited acts of Congress that suggest that there is a strong policy determination by Congress against giving tax exemptions to discriminatory schools, including the 1866 statute and title VI of the 1964 statute as further indications and the role of the courts in making policy is really filling the interstices, trying to guess as best they can if the Congress hasn't stated clearly what Congress would have wanted.

The hazard of an attempt to get something through and failing to do it is that that might be read by the courts as a policy decision on the part of Congress that we no longer want to have a rule against forbidding tax exemptions to discriminatory institutions of this kind, even if the reason for the failure were procedural ones or perhaps an alliance from left and right opposing the proposed legislation on entirely diametrically different grounds, nevertheless, it might be so misinterpreted and there is a hazard in policy being read into such a conclusion.

Mr. **Downey**. Can I ask you, Mr. McNamar will testify before us today that he intends to continue the policy of "applying the 1959 regulations in the charitable area and its efforts to deny exemptions to those organizations engaged in illegal activities."

You gentlemen are conversant with the issues that we have discussed. Is there anything in 501(c)(3) that would support, even according to their logic, than denying tax exemptions on the basis of illegal activities, if you were to follow the logic of their arguments to their conclusion?

Mr. **Tribe**. I think that he is being inconsistent. That is, the proposal of continuing that practice is inconsistent with his whole argument. But once one accepts his proposal, it follows that the administration simply has to retreat, because one of the illegal activities under the Civil Rights Act of 1866 is excluding people on grounds of race, even from a private school.

The U.S. Supreme Court held that that is illegal. It is unlawful. It is not a fuzzy policy question. The question is: Do we want to give a tax exemption for unlawful activity? If Mr. McNamar thinks the answer to that is no—though I can't see why he does, given his reasoning—if he thinks the answers is no, then he really ought to be on the other side of this issue.

Mr. **Downey**. Professor, in fairness on that, I think you refer to the *Runyon* case, is that it?

Mr. **Tribe**. *Runyon* v. *McCrary*.

Mr. **Downey**. That the argument could be made that that 1866 statute is a nonsectarian school.

Mr. **Tribe**. The Court said in that case that it didn't have to reach the issue.

Mr. **Downey**. Then further following that logic, if the administration was to argue that that was clearly illegal, then wouldn't the question of a sectarian school discriminating be best left to the courts to determine that ultimately?

Mr. **Tribe**. It would be rather hard for anyone else to determine it decisively. It is the very issue that this administration urged the Court to decide in *Bob Jones*.

Mr. **Downey**. It could not be determined then by statute?

Mr. **Tribe**. No, because it is a fundamental constitutional question. It is in fact a double-barreled constitutional question. One side argues that, under free exercise of religion, "We have got a right to discriminate without being penalized."

The other side argues, "If we give you a special deal because you are religious, that violates the establishment clause." I think the Supreme Court is the only plausible place to resolve that question.

Mr. **Downey**. Thank you.

Chairman **Rostenkowski**. Mr. Shannon will inquire.

Mr. **Shannon**. Thank you, Mr. Chairman.

I will be very, very brief. Let me just, if I could, pick up on the point that Mr. Downey covered. The *Runyon* case stated that under the Civil Rights Act of 1966, discrimination in private schools was illegal activity. Is that correct?

Mr. **Tribe**. Illegal, as it connotes criminal? That, they didn't say. But they can be sued for it, be made to pay damages for it. It is "unlawful" in that sense.

Mr. **Shannon**. Unlawful activity, so if we are going to maintain a policy of denying tax exemption to institutions that participate in unlawful activities, then under that case we would have to deny tax-exempt schools that discriminate?

Mr. **Tribe**. At least to schools that discriminate outside the context of religion. Religion would remain the open question. The way to get it answered is for the administration to withdraw from its effort to pull the case out from the Court.

Mr. **Shannon**. The Senate conducted, the Finance Committee conducted what were alleged to be hearings into this area earlier this week, and Mr. Schmults testified there as to why this was undertaken, why this policy change was undertaken.

I would like to read you one sentence from his testimony, and ask you to comment on it. He said, "We undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area and concluded that there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970."

Is that within the realm of a simple, honest disagreement among lawyers?

Mr. TRIBE. I don't want to impugn his honesty. I don't know the man, but I can't imagine someone reaching that conclusion. I don't know how one would go about it. It would be a mental operation that I cannot fathom.

Mr. SANDERS. It ignores the *Green* line of cases. It ignores what Congress did in 1976 when they enacted section 501(i). It is just wrong. I don't understand it, and as a former Justice Department attorney, I am embarrassed by that analysis.

Mr. TRIBE. The worst part about it is that it is at least problematic. If someone makes an argument like that, which flies in the face of everything courts have held for 10 years, you would expect the next step to be a willingness to see what the Supreme Court would think of it. But when they also say "let's pull it out from the Court," that is like the 13th chime of a clock: It really makes you wonder about the first 12.

Mr. ROSENTHAL. There are generally two sides to almost any legal question, but this is one that I just can't see the other side to at all.

Mr. SHANNON. I guess we won't put any of you in the undecided column on that question.

Let me ask you now, when we talk about the cases, the authority, what are we talking about here? What court are we talking about having made a judgment in this area? Are we talking about the district court?

Mr. TRIBE. The D.C. circuit, the fourth circuit, and the U.S. Supreme Court; also, in certain respects, the second and fifth circuits, and about a dozen district courts.

Mr. SHANNON. You say the U.S. Supreme Court. You are talking about the Supreme Court having affirmed the *Coit* decision.

Mr. TRIBE. And also in *Norwood,* having there cited the *Coit* affirmance as authority for the constitutional conclusion that Government can't give this sort of aid.

Mr. SHANNON. What is the worst that could have happened if the administration had not made this decision?

Mr. TRIBE. Not made the decision to try to pull the rug out from under the Court?

Mr. SHANNON. That is right.

Mr. TRIBE. The worst from whose point of view? I mean, the Court might have affirmed or might have reversed.

Mr. SHANNON. The case was pending before the Supreme Court and would have been decided.

Mr. TRIBE. In fact, the brief was due December 31, and I guess just a few days before that deadline the Court was informed that the Government might need a little more time because it hadn't figured out whether it was going to go one way or the other.

Mr. SHANNON. Thank you very much.

Chairman ROSTENKOWSKI. Mr. Martin will inquire.

Mr. MARTIN. Thank you, Mr. Chairman.

I want to commend the chairman for assembling a balanced panel here this morning to lead off these discussions. All have agreed, as I understand it, that there is no need for legislation to reassert in the law what the executive branch and the judicial branch have already fashioned into tradition and practice. You are saying, in effect, leave it to your profession and your students, and not to ourselves.

You know, of course, that we are going to legislate, because the Congress won't get any satisfaction out of inaction. I am interested in the point Professor Sanders has raised about what happens if we start down that road and fail, but I think he can reassure himself that there will probably be overwhelming objection by the Congress in this area, and so I don't think he need concern himself too much about that.

All of you do agree, as do we, that racial discrimination is forbidden under the Constitution, in practice if not in belief. We all want to do what is required under the Constitution, so if we start down that road, we need your help on a point that you haven't really touched on very much.

The point I am saying, in seeking to legislate, we might find ourselves compelled to find some legal way to elevate a prohibition against discrimination insofar as tax exemption is concerned in a way that sets aside the first amendment, or supersedes it or ignores it or avoids it in some way, which you really haven't addressed yourselves to, sort of saying we will let the Supreme Court take up that matter. But if we get into legislation, we ought to have some guidance from your profession as to what we should do.

For example, you had a discussion, and there was general amusement about killing of racial minorities and so forth. I don't think anyone who is in the panel before us, would pretend that that is a fair analogy. I don't think it is the sort of thing for which you would give an A to one of your students. There are other analogies, and maybe they are not good ones either, but we need you to think about these.

For example, there is a major religious tradition in this country which believes in polygamy. Belief in polygamy is not a hypothetical killing of minorities. I think I am correct that someone is free to believe in polygamy in this country, not practice it.

I think I am also correct that members of a great religious faith are free to believe in animal sacrifice and the efficacy of that. I don't believe that it is legal to practice that in this country.

And so I think we need to get into the question of differentiating belief from practice with regard to legislation having to do wth a tax exemption, not just to say "racial discrimination" and then leave it up to the courts and lawyers and the judges to determine what it was we meant, but for us to grapple with that.

It doesn't require us to get into all of the specifics, and I think Mr. Sanders is quite correct on that, but we ought to at least get into the principles.

Another example. There are those who have advocated a belief in the spiritual efficacy of hallucinogens. They can believe that but they can't practice it. It is our hope that you would address that. Mr. Sanders.

Mr. SANDERS. Yes. When an organization files the application for exemption, the Internal Revenue Service will review their practices, their procedures, their activities. Their beliefs are not relevant. That is important.

Mr. MARTIN. That is the point I am making.

Mr. SANDERS. I understand. So there is no problem really. An organization can believe whatever it wants, but we are really going to the practices, the activities, and the purposes of the organization. That is the fundamental matter that the Internal Revenue Service will focus on before it approves the exemption of the organization.

Mr. MARTIN. So in that context, a religious institution would be free to have a belief in opposition to interracial marriage. They would be free to hold that belief but not to practice and impose it on others? Are you saying that is correct?

Mr. SANDERS. That is right.

Mr. ROSENTHAL. And I would assume, sir, to carry this a step further in the present context, that if an organization had that belief and even enunciated it to its students, that that would not deny it a tax exemption. But if it expelled students who engaged in interracial marriage, then it would get into trouble.

Mr. MARTIN. And on that ground then, the Internal Revenue Service would have some case before it where there was such an expulsion, not just the fact that it advocates such a belief, and seeks out those who hold such a belief, but would actually have to expel someone for violating that belief?

Mr. ROSENTHAL. It would have to be that sort of thing because we do have a Supreme Court case involving interracial marriage.

Mr. MARTIN. Is that related to the cases at hand? Do we have people who were expelled for violation?

Mr. TRIBE. If I understand part of what you are getting at, it is that at least some people strongly believe that the IRS goes overboard with various preventive dragnet rules that don't focus on the thing case by case. There is room for genuine disagreement about that, and there is a great deal to be said both for the case-by-case approach and for the idea that, if you do it that way, it is unfair and not evenhanded.

But That is not what this issue is about at all, I think. This issue is about a wholesale decision by the administration that, until the law is written in stone and explicitly, the IRS cannot do anything in this area, even case-by-case. But the administration is not willing to subject that proposition of law to the Supreme Court, where it can be fairly and fully tested.

Mr. MARTIN. I believe with one exception this panel has said they are not that familiar with what was actually written by the administration, so we will probably have to wait on their interpretation of the basis on which they took their actions.

Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. The time of the gentleman has expired. Mr. Matsui will inquire.

Mr. MATSUI. Thank you, Mr. Chairman.

I would like to follow up on the comments made by the gentleman from North Carolina, if I may, and perhaps clarify in my own mind a number of misunderstandings that may exist. It is my understanding that we are not talking about beliefs in the *Bob Jones* case. The issue of beliefs is totally irrelevant as far as the IRS is concerned.

It is the pattern and practice of racial discrimination that the IRS historically has been concerned with, and if the gentleman from North Carolina would permit me, I would just like to indicate exactly what constitutes a pattern of practice. If a young man who happens to be 18 years old decides to go to Bob Jones University—and for what logical reason I would not know, but if he should decide to go—he would have to sign a statement saying that he would limit his freedom of association at that institution, unlike a person who happens to be white. I think that is the obscene position and activity that we are discussing here today; it is not the issue of beliefs. That is certainly allowed under the Constitution of this country.

I would like to discuss with Dean Rosenthal for a minute the issue that I think was fundamental in the administration's brief that resulted in the administration's change of position. They talk about a strict construction of the definition of charitable, scientific, religious or educational, and they use the terms in the disjunctive. They apparently disregard the common law with respect to the interpretation of charitable as it pertains to educational institutions. Is there any legal basis for that position, Dean Rosenthal?

Mr. ROSENTHAL. There might at one point have been, but there is such a long history even going before 1970 in the *Green* case, in which the notion of charitable, as meaning consistent with the public policy of the Nation, had been applied by the courts, so that when 170 or the other section 503 were enacted, Congress had before it this history of taking that word "charitable," and knowing that the courts had put that gloss upon it, and then we have the 10 years of history since, in which that same interpretation has been put upon it.

If we were writing on a clean slate, if we were back in the 1850's and this was a new law being enacted and that language was in it, we might have a close question. But we can't forget a century of history in the way that phrase has been used.

Mr. MATSUI. In fact, the IRS has been using the definition of charitable as you describe it since 1923; is that correct?

Mr. ROSENTHAL. Yes, sir.

Mr. SANDERS. May I add that the title to section 170 is "Charitable, etc. Contributions and Gifts," and in the *Bob Jones* appeals decision they specifically referred to section 170, and the overall definition of charitability.

They also cite the legislative history under section 501(c)(3), specifically going back to the House report in 1939, the promotion of general welfare, a very basic overriding national public policy which underlies all of the seven different categories under section 501(c)(3).

Mr. TRIBE. Could I add a word to that? Having said so much about truth, I just can't let all that pass. I think we are not being fair to the administration on this one issue. In my view, there is a much more solid argument for their reading of the word "charitable" than other people are giving them credit for.

That word "et cetera," which they italicize in their brief, is then followed by an enumeration every bit as long in section 170 as in section 501(c)(3). The only reason that didn't move me an inch in my ultimate conclusion is that there are completely independent bases for the 1971 *Green* decision and for the fourth circuit's *Bob Jones* decision—namely, whether or not the word "charitable" points to a requirement that must be met over and above "educational" and "religious," the fact is that something isn't entitled to exemption under any of those categories if it violates a national policy clearly enunciated in constitutional and statutory law.

Mr. MATSUI. Dean Rosenthal concedes that this is a case of first impression.

Mr. TRIBE. When we are on the other side of this——

Mr. MATSUI. Let me ask you a question, Professor Tribe. The administration will exempt two schools, Bob Jones and Goldsboro, but the others, they will not even receive or entertain an application. Is there an equal protection problem with respect to other schools that might be in the same position?

Mr. TRIBE. It could be a serious equal protection problem. The only thing is that equal protection standards are so relaxed that it doesn't take much to satisfy the rationality requirement these days. I don't think a court would say that it is so irrational as to be unconstitutional to give special favoritism to these two. But I think that, even though a court might not say it, an ordinary human being looking at it would ask the administration, "What is your rationale for giving a special deal to these two and nobody else?" I think that they have to answer that question at the bar of politics and morality as well as law.

Mr. SANDERS. I would like to point out, if I may, that the administration is proposing to dismiss the counterclaim of $480,000 against the Bob Jones University, so Bob Jones would get a benefit that other schools operating similarly will not.

Chairman ROSTENKOWSKI. Mr. Ford will inquire.

Mr. FORD. Thank you, Mr. Chairman.

Last week I heard a panel of legal scholars testify before the Judiciary Subcommittee on Constitutional Rights, and they, too, indicated to that panel that they didn't see the need for legislation.

If we agreed that the law is clear, what should the Congress do to enable IRS to execute the policy of denying exemptions to the private schools that discriminate on the basis of race or color? Basically, do we have a need for the IRS to issue new regulations, since we have not had any since 1978?

Mr. SANDERS. First of all, we really didn't have a revenue procedure in 1978. They were in proposed form in 1978 and in 1979, and the appropriations rider has stopped any enforcement, so we are really back to 1975, 75-50, which admittedly doesn't work, so we need help.

What I think Congress should do is adopt a joint resolution along the lines that Mr. Rangel has submitted, and make it clear that the *Green* line of cases is the law, and has always been the law, and authorize and encourage the Internal Revenue Service to do its job.

It is well equipped to do the job. Ultimately it is the government body that is going to have the responsibility for setting the standards and guidelines. They have the mechanism to do it. They can go out and publish in proposed form a new procedure that I think will provide guidance not only for the schools, which is most important, but for the revenue agents, so we can have evenhanded enforcement throughout the United States, and we won't be in a mess whereby we have one set of rules now in the *Green* case that apply to Mississippi and confusion applying to the rest of the United States.

Mr. **Ford**. Mr. Rosenthal?

Mr. **Rosenthal**. I am a little diffident to suggest what procedures Congress should follow, because of this fear that several of us have expressed, if we are not sure, if you don't have the votes counted, what the consequences might be of your strategy misfiring.

Mr. **Ford**. We have heard you three legal scholars and others state the law is clear, that legislation is not needed at this time. But what should we do to enable IRS to execute the laws of the land?

Mr. **Rosenthal**. I would love to see you, in some form of resolution, say you regard the *Green* case and the rest of what we have been talking about laws continuing to be the law of the land, that it is the intention of Congress that this be carried out.

I would agree with Mr. Sanders that the 1978 and 1979 proposed regulations, which would have put some teeth and some uniformity in the way in which it was carried out, that those appropriation riders be withdrawn or no longer continued, and those also be given the effect of law, so that we really turn this into an opportunity to carry out the policies that we have all professed belief in.

Mr. **Ford**. Are there regulations now where we can determine whether a school is discriminating or not? Are there regulations at the IRS?

Mr. **Sanders**. As I said before, the problem is that the 1978, and 1979 proposed revenue procedures which are not in force now. The commissioners must rely on the Rev. Proc. 75-50, that admittedly does not work, so what we need, really, is a new revenue procedure. We have got to have a new proposed revenue procedure that is published and then have hearings, submit written comments. We need to go through the procedure that we did a few years ago, for which I commend the IRS.

After we get advice from the Members of Congress, from the private schools, and from the religious schools, at that point the Internal Revenue Service can publish the final revenue procedure, and the revenue agents can go out and enforce it. I think that that will work to the benefit of most of the schools in this country, because they are going to comply with these rules. They are not going to have difficulty.

It will be a lot easier for them to comply if we know what the rules are and they are applied on a national basis.

Mr. **Tribe**. Let me say I disagree very strongly with the idea that for Congress to pronounce its own opinion upon a line of cases would be a useful thing. I think it would in fact be horrible. It would be racist to do it in this kind of a case and not elsewhere, and it would bog the Congress down forever to do it across the board.

It would be useless in informing anyone, because the Supreme Court has said it doesn't care what a subsequent Congress thinks the meaning of a prior Congress enactment is, and it might violate separation of powers principles. The need is to restore the status quo prior to the Reagan administration's messing around in this situation.

That can't be done by Congress saying, "We hearby proclaim that *Green* was rightly decided". It can be done by censuring the administration, by concurrent resolution or otherwise, for having misled the Supreme Court of the United States; urging the administration to resume its litigation in the pending Supreme Court cases; and criticizing the administration, by resolution or otherwise, for departing from orderly legal and administrative procedures in this area.

Chairman ROSTENKOWSKI. The time of the gentleman has expired. Mr. Rousselot will inquire.

Mr. ROUSSELOT. Thank you, Mr. Chairman.

Let me thank you, gentlemen, for your testimony. My understanding of the Supreme Court ruling on *Walz* v. *Tax Commission,* 1970, was that the granting of tax exemption is an act of neutrality and does not amount to granting aid or a subsidy. Do you find yourself in conflict with that situation?

Mr. TRIBE. I find myself in conflict with that description of the decision.

Mr. ROUSSELOT. Let me read from it.

Mr. TRIBE. I have read it.

Mr. ROUSSELOT. Can I read it so that we can all hear the same thing. Am I allowed to read it?

Mr. TRIBE. Of course.

Mr. ROUSSELOT. I hate to be the 14th chime.

"The granting of a tax exemption is not sponsorship, since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."

Do you disagree with that statement?

Mr. TRIBE. When it is a tax exemption for nonprofit property, I agree with it and have cited it in briefs in the Supreme Court. I believe in it fervently. I don't think the statement applies when a special exemption is given to one group and not to another—when racial discrimination is not treated as disqualifying, while other kinds of illegality are so treated.

On the very page either before or after that quotation, the Chief Justice goes out of his way to say that what made the tax exemption perfectly proper there was its inclusion as part of a neutral policy of not taxing people who aren't earning money with their property—hospitals, libraries, and all the rest.

There is a strong suggestion, both in the Chief Justice's opinion and in Justice Brennan's concurring opinion, that, if there were not that neutral principle, and if instead we were going out of our way to give special benefits to this or that religious group, we would have very difficult constitutional problems.

Mr. Rousselot. Right. But in this case they decided that it was not a subsidy or grant.

Mr. Tribe. I guess that is the language.

Mr. Rousselot. You are saying it doesn't apply, or what?

Mr. Tribe. I am saying it doesn't apply here, and I think the Court in *Norwood* v. *Harrison,* when it analogized tax exemptions to free books, in effect held that the *Walz* statement doesn't apply in such cases as this. The phrase "tax exemption" is a very broad one; it can cover lots of things.

Mr. Rousselot. We understand that in this committee. Do the rest of you want to comment on this case?

Mr. Rosenthal. Might I add a word on that? I think this is one of those instances that Justice Holmes referred to when he said a page of history is worth a volume of logic. I think we have a long historical tradition in this country of having tax exemptions to religious organizations including the corollary of tax deductions for contributions to religious organizations, and I just don't think we can equate that with the tax exemption given to a school, whether a church-related school or otherwise.

Mr. Rousselot. I am concerned that if it is church-related then you do get into religious questions. You don't wish to separate them.

Mr. Rosenthal. I really was addressing a somewhat different issue, and that is when we ordinarily have an establishment clause problem, if the government gave money to a church, we would be in serious difficulty.

Mr. Rousselot. Right.

Mr. Rosenthal. And yet we recognize that, economically, that may be indistinguishable from the Federal Government or a State government giving a tax exemption to that church, but historically we have always done it that way, and I think we have to treat the religious tax exemption as something special, and not regard it as an analogy for tax exemptions in other areas, such as schools, for example.

Mr. Rousselot. Mr. Sanders, do you want to comment?

Mr. Sanders. I agree with the prior statement.

Mr. Rousselot. There has been a lot of discussion here today that the *Green* decision is law. I have heard that stated several times. In the background study done for our committee, quoting from *Bob Jones University* v. *Simon,* it said that the Court's affirmance in *Green* "lacks precedential weight of a case involving a truly adversary controversy."

As I read that, I don't see in their decision that they were saying that *Green* was the law of the land.

Mr. Tribe. May I comment? When I discussed the case of *Hicks* v. *Miranda,* I was relying on a decision on this very problem. The Court in *Bob Jones* v. *Simon* relied on *Green,* to deny a preliminary injunction, but said that *Green* is not as strong a precedent as other cases, for the Court's own purposes. But others are not free to pick and choose among the Court's precedents, according to *Hicks.*

When such cases are decided, they are binding. And, quite apart from their being binding as precedent, there is something else involved in the *Green* case. The *Green* case involved a nationwide declaratory judgment, and a Mississippi-wide injunction.

Both of those decrees are still in force. Whatever one thinks of the case as precedent, people can be held in contempt for violating the injunction part, and have to have some special explanation for violating the declaratory part. The Treasury Department, after all, was the defendant in that case. The fact that they were a party and are bound by the ruling means that all of the discussion about how good a precedent it becomes is beside the point.

Mr. ROUSSELOT. I just don't think I saw in that decision saying this is the law of the land, as we all have loosely talked about it here today.

Mr. SANDERS. The *Green* case has subsequently been cited in the *Norwood* case. Also, Congress itself in 1976, some very significant congressional history, when it enacted section 501(i) referring to *Green* as national public policy and extending it into the social club area and obviously racial discrimination in schools is more important, I think we will all agree, than the racial discrimination in social clubs.

Chairman ROSTENKOWSKI. Mr. Bailey will inquire.

Mr. BAILEY. Thank you very much.

I welcome you. Professor Tribe, it is nice to see you again. You may not remember we had a nice talk up at Harvard starting with *Marbury* v. *Madison*.

Chairman ROSTENKOWSKI. Would the gentleman speak into the microphone?

Mr. BAILEY. I am trying, Mr. Chairman. I generally don't suffer for lack of air. I appreciate your interest in what I have to say, Mr. Chairman.

I don't think there is any need to rehash the other questions that have established the interpretations of law, and incidentally, I would like to thank you, Professor Tribe, for introducing concepts of neutrality, and Professor Rosenthal, the obvious policy use that we have made of exemption procedure, because I think in terms of writing tax law, we need to recognize that reality, and there is no pristine way to do otherwise. I just don't think we can.

I think we have written good law, and I think the courts have interpreted it well.

I do have a question about standing. As I read these cases, I don't know the answer to this one. I, as a white Pennsylvania citizen, would I be a member of a class to bring an action in another State against an action seeking an enjoinment of this type of action?

Mr. TRIBE. The Supreme Court has been increasingly precise about requiring a showing of personal injury, and being merely a citizen or a taxpayer is not generally enough.

Mr. BAILEY. To cut down on litigation?

Mr. TRIBE. No, it is deeper than that. Article III of the Constitution, the Court thinks, doesn't make the Federal judiciary a roving commission just to correct things. It is not just the utilitarian idea of having less lawsuits.

Mr. BAILEY. That is what I figured the answer was going to be. The issue of standing, and what we are doing here really gets to the question Mr. Rangel is trying to address, and a comment you made about the Congress commenting on a line of cases. I happen to agree with you that is not the best way to go, so let's take this problem that is really the root difficulty here, and that is, I guess, selective enforcement. That is a problem we appear to have here.

You are talking about some of the implications you mentioned about separation of power problems and arguments in that context. Has it ever been addressed in the law for Congress? I don't think it has. I don't have the knowledge I think you people do where Congress shall say "Thou shalt enforce."

We have had problems with judicial excess in this system. We came up with three-judge panels in response to those kinds of problems in the past, and I know you are very well acquainted with those kinds of difficulties.

We have had problems with our law enforcement agencies not enforcing laws which we as a people and as a legislature want them to do. What do you suggest we do about that, if indeed we should do anything?

Mr. TRIBE. I guess I think that is one of the inefficiencies that we should be happy that we have to live with. I mean, if one branch of government could both make the policy and tell the executive, "Enforce it, no matter what," and tell the judiciary, "Find everybody guilty," that would be the end of our system of fragmented power, of checks and balances. Although it is frustrating that sometimes there is nullification by nonenforcement, I don't think the legislature constitutionally should be able to insist on full enforcement.

Mr. BAILEY. So until we could or we can elect a new President, what you are saying—and assume that the policy would change—that we should tolerate this. We don't have much choice, or hopefully rely on the great weight of the outraged opinion in this country to make the policy?

Mr. TRIBE. We certainly can't make them enforce it.

Mr. BAILEY. We can't make them enforce it. Well, that is violating, and I really think that is what the core issue is here. I don't think we have really addressed it because when it comes down to doing something about it, it is a clear case where the executive branch has simply said, "We need the Justice Department to enforce these provisions. That is what we need."

And the standing interpretations, you know when we suggest that maybe we do something about standing, should we confer a right on these groups or on an individual to seek injunctive relief against the service for nonenforcement? You wouldn't recommend that I know from what you have just said, but, you know, what are we left to do?

Mr. TRIBE. I don't want to be repetitive, but I think you should censure the administration.

Mr. BAILEY. Censure the administration?

Mr. TRIBE. I think they have behaved in a way that is lawless.

Mr. BAILEY. They are acting in a way that is lawless and we have no remedy.

Mr. TRIBE. Censure is a pretty serious remedy.

Mr. BAILEY. Well, I don't know about that.

Mr. TRIBE. It would be regarded by some as quite extreme.

Mr. BAILEY. I don't know if I agree with your conclusion. I admire you as a brilliant analyst, by the way. I do think that there are some check-and-balance problems in this system, but I would say to you, gentlemen, that this is a selective enforcement problem.

I would hope that the administration would realize those implications, because that is really the broad question that is involved here, as I see it.

Mr. SANDERS. There is protection on the other side. If the Commissioner goes too far, you have the declaratory judgment relief that I talked about before. If the Commissioner doesn't act or goes too far, an organization can take the Commissioner into court. Many have, and many have succeeded.

Mr. BAILEY. Professor, look, declaratory judgment is going to give us, when some particular legal environment meets its requirements, a real nice, good definition of the law when we need it, but it is not going to solve the problem we have talked about here with selective enforcement. You know that. Do you think it will? Forgive me, but I don't see how declaratory procedures, as I understand rules of court, could solve that problem.

Chairman ROSTENKOWSKI. The time of the gentleman has expired.

Gentlemen, thank you very much for joining us. It has been a very informative and, I am sure, educational discussion. The Chair would also like to make the observation that the minority was asked if they wanted to have anybody testify. They were consulted. I don't believe there were any suggestions from the minority.

Mr. MARTIN. Mr. Chairman, none of these witnesses are from the minority.

Chairman ROSTENKOWSKI. The panel was discussed with the minority as well.

Thank you very much, gentlemen.

The Chair calls the next panel: Mr. Randolph Thrower, former Commissioner, Internal Revenue Service; Mr. Carr Ferguson, former Assistant Attorney General, Department of Justice, Tax Division; and Mr. Jerome Kurtz, former Commissioner, Internal Revenue Service.

The Chair would also like to make the observation that all former Commissioners of the Internal Revenue Service and former officials of the Tax Division of the Justice Department who had served in the last 12 years were invited to testify. Those members who are not present today declined for various reasons, including conflicts in their schedule. We are very grateful to you gentlemen for joining us this afternoon.

In addition, there are several letters—a letter from former Commissioner Don Alexander and Mr. Walters, which will be made part of the record.

[The letters follow:]

MORGAN, LEWIS & BOCKIUS
COUNSELORS AT LAW
1800 M STREET, N. W.
WASHINGTON, D. C. 20036
TELEPHONE 202 872-5000

PHILADELPHIA
NEW YORK
LOS ANGELES

MIAMI
HARRISBURG
LONDON

DONALD C. ALEXANDER
DIAL DIRECT (202) 872-5045

February 3, 1982

Hon. Daniel Rostenkowski
Chairman
Committee on Ways and Means
1136 Longworth House Office Building
Washington, D. C. 20515

RE: Committee on Ways and Means:
February 4, 1982 Hearing

Dear Mr. Chairman:

As I have advised your staff, I regret that two long-standing commitments in New York City on February 3-4, neither of which could be changed when I was invited to testify, prevent my testifying at the above hearing on the issue of tax exempt status of private schools which engage in racial discrimination.

As I previously stated, I think the Internal Revenue Service has an obligation to follow the law and the law is clear: educational institutions that practice racial discrimination are not entitled to income tax exemption. The Internal Revenue Service did not make this rule; it has been established by the courts, including the Supreme Court. The Department of Justice should permit the Bob Jones and the Goldsboro cases to proceed.

As a member of the Executive Committee of the New York State Bar Association Tax Section, I participated in the drafting of a letter to the President on this subject. A copy of this letter, in which I fully concur, is attached.

Very truly yours,

Donald C. Alexander

/alt

cc Hon. Barber B. Conable, Jr.

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Sydney R. Rubin
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Excise and Miscellaneous
Paul R. Comeau
1800 One M & T Plaza Buffalo 14203

Exempt Organizations
Jonathan A. Small
299 Park Avenue New York City 10171

Financial Institutions and Financial Futures
Donald Schapiro
26 Broadway New York City 10004

Foreign Activities of U.S. Taxpayers
William J. Caverley
201 Tabor Road Morris Plains NJ 07950

Incentives
Alan S. Rosenberg
300 Park Avenue New York City 10022

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Robert J. Levinsohn
300 Park Avenue New York City 10022

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Sterling L. Weaver
2100 Lincoln First Tower Rochester 14603

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111 Washington Avenue Albany 12210

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25 Broadway New York City 10004
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140 Broadway New York City 10005

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Two State Street Rochester 14614

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767 Fifth Avenue New York City 10153
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900 Midtown Tower Rochester 14604

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Robert J. McDermott
140 Broadway New York City 10005

Tax Exempt Bonds
Dale S. Collinson
153 East 53rd Street New York City 10022

Tax Policy
David D. Luria
30 Rockefeller Plaza New York City 10112

U.S. Activities of Foreign Taxpayers
William L. Burke
One Wall Street New York City 10005

February 1, 1982

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to express the views of the Tax Section of the New York State Bar Association on the recent announcements of Administration policy with respect to the tax-exempt status of racially discriminatory private schools.

The Tax Section believes that existing law requires that private schools that discriminate on the basis of race be denied tax exemption and the right to receive tax deductible contributions. This requirement is not only an administrative policy but is grounded in court decisions. We therefore urge that you direct the Treasury Department and the Department of Justice to take whatever action is appropriate to restore the government's position on the issue of tax exemption for private schools to that in effect prior to the Treasury Department announcement of January 8, 1982.

The denial of exempt status to private schools that discriminate on the basis of race was established more than ten years ago in *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd mem. sub nom. Coit v. Green*, 404 U.S. 997 (1971), and was recently confirmed by the United States Court of Appeals for the Fourth Circuit in *Bob Jones University v. United States*, 639 F.2d 147 (1981), and in *Goldsboro Christian Schools, Inc. v. United States*, unpublished opinion, February 24, 1981, *cert. granted* (both

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cases), 102 Sup. Ct. 386 (Nos. 81-1, 81-3, 1981 Term). See also *Runyon v. McCrary*, 427 U.S. 160 (1976); *Norwood v. Harrison*, 413 U.S. 455 (1973).

Green v. Connally was a class action, brought before a three-judge District Court for the District of Columbia in 1969, against the Secretary of the Treasury to require the Internal Revenue Service to deny tax exemption to racially discriminatory private schools in Mississippi. Only after the court issued a preliminary injunction (*Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C.), *appeal dismissed sub nom. Cannon v. Green*, 398 U.S. 956 (1970), *appeal dismissed sub nom. Coit v. Green*, 400 U.S. 986 (1971)), did the Service announce that it would no longer grant exemption to schools that discriminate on the basis of race. IRS News Release, July 10, 1970. In 1971 the court granted the plaintiffs declaratory and permanent injunctive relief. The Service was ordered by the court to deny or revoke the exemption of private schools in Mississippi that discriminate on the basis of race, and the Supreme Court affirmed. *Green v. Connally*, *supra*. The injunction issued in the *Green* case remains outstanding.

In 1976 a class action was filed against the Secretary of the Treasury seeking to compel the Service to withdraw tax-exempt status from, and refuse to grant it to, racially discriminatory private schools outside of Mississippi. Petitions for certiorari on the question of the standing of the plaintiffs in this case are currently pending before the Supreme Court. *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981), *petitions for cert. filed*, 50 U.S.L.W. 3353 (U.S. Oct. 20, 1981) (No. 81-757), 50 U.S.L.W. 3467 (U.S. Nov. 23, 1981) (No. 81-970).

The Tax Section believes that the law is clear: private schools that discriminate on the basis of race do not have tax-exempt status under the Internal Revenue Code and contributions to such schools are not deductible under the Code. We believe that further legislation is not a prerequisite for the denial of tax benefits to such schools.

Respectfully yours,

Ruth G. Schapiro
Chairman

LEATHERWOOD, WALKER, TODD & MANN
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS
GREENVILLE, SOUTH CAROLINA 29602

Wesley M. Walker
J. D. Todd, Jr.*
Fletcher C. Mann*
Johnnie M. Walters*
James H. Watson*
W. Frank Plaxco*
C. Brantley Phillips, Jr.*
John E. Johnston, Jr.*
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O. Doyle Martin*
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Bradford Neal Martin
Natalma M. McKnew
Richard L. Few, Jr.
Fletcher C. Mann, Jr.
William L. Dennis
Gwendolyn D. Embler
Robert A. DeHoll

*A PROFESSIONAL ASSOCIATION

217 E. Coffee St.
(803) 242-6440
P. O. Box 2248

Counsel
D. B. Leatherwood

January 27, 1982

COMMITTEE ON
RECEIVED
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WAYS AND MEANS

John J. Salmon, Esquire
Chief Counsel, Committee on Ways
and Means
1102 Longworth Building
Washington, D. C. 20515

Dear Mr. Salmon:

You are aware that Pam Pecarich of your staff telephoned me on January 26, 1982, and invited me to participate in a hearing before the Committee on Ways and Means with respect to the proposal that tax exemption be denied organizations that discriminate. Ms. Pecarich advised me that you are attempting to have several former Commissioners of Internal Revenue and one or more former Assistant Attorneys General (Tax Division) participate on a panel in an effort to obtain more information and greater insight in the development and administration of policies of prior Administrations.

After very careful consideration, in a telephone conversation with Ms. Pecarich this morning, I declined the invitation. I explained my reasons for declining and informed Ms. Pecarich that I would send this letter to you confirming that telephone conversation.

I explained to Ms. Pecarich that I declined reluctantly but that I really had no other choice. I outlined my reasons for declining, and I repeat them now. I was Commissioner of Internal Revenue at the time Bob Jones University commenced litigation to enjoin the Internal Revenue Service from withdrawing assurance of deductibility of contributions to the University and denying tax exempt status to the University. That was in early 1971. That litigation went from the District Court in South Carolina to the Fourth Circuit Court of Appeals and then on to the United States Supreme Court. The firm with which I now practice as a partner, Leatherwood, Walker, Todd & Mann, of Greenville, South Carolina, represented Bob Jones University in that suit.

The litigation now pending before the Supreme Court was begun in 1976 by Bob Jones University to recover a small amount of tax paid by it. The Federal District Court held that the University was entitled to the refund. The Fourth Circuit of Appeals reversed that decision, and the University filed a

Petition for Certiorari with the United States Supreme Court. The Supreme Court granted that Petition. Leatherwood, Walker, Todd & Mann represented Bob Jones University in the District and Fourth Circuit Courts. While Leatherwood, Walker, Todd & Mann is not handling the case in the Supreme Court, we continue to represent Bob Jones University on a retainer basis.

In the opinion of my partners handling the Bob Jones University litigation in the two cases and those regularly handling matters in behalf of the University, the conflict of interest or the appearance of conflict that might be raised by my participation on the panel dictates that I not participate. I fully concur, and that impels my declination.

Because of my determination to avoid conflict or the appearance of conflict or impropriety, I have recused myself from participation in the Bob Jones University litigation leading to the present Petition before the Supreme Court. Also, I declined to participate in a seminar relating to Church, Law and Taxes sponsored by and held at Bob Jones University last October. Further, just last week, I declined to comment on the pending legislative proposal when requested for comment by the local media.

You, we are confident, can see that very likely any appearance by me on the panel would raise questions of conflict or impropriety. Thus, my appearance probably would not contribute in a positive way to the hearing. Accordingly, with considerable reluctance, I must and do decline the invitation.

Sincerely yours,

Johnnie M. Walters

Johnnie M. Walters

JMW:nc

Chairman ROSTENKOWSKI. Gentlemen, we are extremely grateful for your joining us this afternoon. Following the policy I have outlined, I will ask you to summarize if your statements are extremely long. I am sure many of my colleagues want to engage you in exchanges. With that, Mr. Thrower, you may proceed.

STATEMENT OF RANDOLPH W. THROWER, FORMER COMMISSIONER, INTERNAL REVENUE SERVICE

Mr. THROWER. Mr. Chairman, members of the committee, I am a practicing lawyer in Atlanta. I was the Commissioner of Internal Revenue in 1970 when the policy under consideration was launched. It may be that a review of what was done at that time and why it was done may contribute to the resolution of the problems now before you. I will try to be objective and dispassionate, although I may show some natural tendency to protect the progeny that we produced.

The 1970 decision was, Mr. Chairman and members of the committee, a very fully considered and a well-reasoned decision. Most legal advisers within the government were in accord with it. At the time and even now, some observers outside of government, outside of those in government at that time, have seemed to think that it was an arbitrary act of the Commissioner, perhaps made in haste. Nothing could be farther from fact.

Perhaps no other decision made by me received as much study and attention from so many people in so many different departments and agencies of Government as did this. It received the personal attention of the Attorney General, the Secretary of the Treasury, the Secretary of Health, Education and Welfare, and their staffs, of many officials in the White House and of the President himself.

It was an issue that had been studied in the Service since the late 1950s. The decision of the Supreme Court in *Brown* v. *Board of Education*, the passage of the Civil Rights Act of 1964, the large movement of white students into private schools, many of them newly organized to avoid court-integrated public schools in many sections of the country, would not permit us to put off the decision on this issue any longer.

The Tax Reform Act of 1969 focused attention upon the issue of charities as it had never been done before. This committee some years ago and the Senate Finance Committee insisted that our study of the field of charity be broadened, deepened, and intensified. To satisfy these committees, I agreed to appoint an Exempt Organization Advisory Committee to study the social, moral, governmental, and legal philosophy undergirding the provisions of the Internal Revenue Code relating to charity. We appointed religious leaders, outstanding educators, people from business and lawyers and others across the spectrum of society.

It was significant to us in our deliberations together that for almost 400 years of legal history in England and the United States, charity has been recognized as a narrow term denoting direct aid, as in giving alms, and also as a broad term encompassing religion, education, direct aid, and programs of exclusive public interest and benefit. This was recogized by the courts, recognized in the Internal Revenue Code, and in its legislative history.

It was well established in the law that the legal standards of charity were not met if, by reference to current standards, the activity was illegal, against clearly established public policy, or merely frivolous. It would be ludicrous to attempt to apply the standard of charity or the laws of charity without this guiding light.

The classic example would be that, without such a standard, the "Fagin School for Pickpockets" might be recognized as educational and charitable. Direct aid to support violation of the law might otherwise be recogized as charitable.

You may be interested in the fact that early in our study a group from the Lawyers Committee on Civil Rights, among them some of my good friends, asked if they might have a few minutes to visit with me. I assumed they were going to ask me to make a speech. They told me that they were at that very time filing suit against me, that I should not take it personally, but I would soon be personally served.

I told them that we had the subject under study, that we were not unaware of the problem by any means, and that the litigation might tend to accelerate our consideration of it. This was the Green suit brought on behalf of black parents and their children in Mississippi, challenging the recognition of tax exemption for schools in Mississippi asserted to be a part of an organized system of avoiding the efforts to integrate the public schools.

Thereafter there were those who counseled that since the issue was in litigation, we should take no action. I was concerned over the fact that if we took no action, we might place the admission policies of the private schools in the Federal courts, as had occurred with the public schools over the past decade. I think that concern was well founded.

Our lawyers at the Department of Justice, after study, advised that we would very probably lose the *Green* case on the issue of standing and on the merits in the district court, in the court of appeals, and in the Supreme Court. It seemed to me that the only supportable cause of action for us to take was to recognize our legal responsibilities. That was fully considered.

Finally, the decision was made by the President to do what legally we felt required to do. The fact of the adoption of a new policy was announced at the White House, and the policy itself was announced and explained at the Internal Revenue Service. It was very clear, it was very simple and it was very direct. We would not thereafter recognize as tax exempt a private school that, as a matter of policy and practice, was pervasively discriminatory on the basis of race. When I say pervasive discrimination—that was a term that I undertook to use frequently at that time—we meant exclusion from admission on the basis of race.

We provided for a "fresh start" for every private school, regardless of its background. Each school seeking to maintain its tax exemption or to secure a tax exemption would have to demonstrate that it had a racially nondiscriminatory policy.

We no longer could construe the Internal Revenue Code or rather attribute to Congress an intent to grant or to recognize tax exemption in instances where the fifth amendment was being violated or where very serious questions of constitutional violations were involved.

We thus could no longer consider pervasive racial discrimination as within the concept of charity set forth in the Internal Revenue Code. Able lawyers could at that time, of course, have differed on that question. Some did, but certainly the correctness of it has been strongly reaffirmed since that time by court decisions, including an affirmance by the Supreme Court that does not have full precedential authority. Because of the change of position by the Government in that case, the issue was non-adversarial. It was not fully argued before the Court. The fact that it is not fully precedential would underscore the desirability of proceeding with the cases now before the Court, so that a decision would be obtained that would be fully precedential.

The reaffirmation of the policy inferentially by the Congress itself has been emphasized, and I will not repeat that. I think it is significant that the Senate Finance Committee, in providing that tax exemption should no longer be recognized for racially discriminatory social clubs, referred to the principle of the *Green* v. *Connally,* which endorsed the 1970 policy, and also put its decision with respect to the social clubs on the basis of "national policy."

Let me emphasize, and I think this is significant that our earlier rule was intended to establish and assure equal accessibility to all races as a condition for recognition of tax exemption. It could not assure attendance by minority students. It has had a significant impact but not as much as some had hoped.

Hence, there is still a threat of widespread litigation over this issue. We recognized at that time that difficulties would arise with respect to private schools affiliated with religious organizations and we concluded that no religious institution could throw the mantle of the first amendment around pervasive racial discrimination as signified by no admittance to persons of a particular race. But we did leave difficult questions with respect to religious organizations to my successors.

As to the present procedural tangle, I see no way out of the quagmire except by the course taken to get into it. It seems very important to me that the court in some way be permitted to proceed with a decision in the *Bob Jones* case, and in the *Goldsboro Christian School* case. It has taken more than 10 years for those issues to get squarely before the court. It would be unfortunate, either through new legislation or the lack of new legislation, for new litigation to be required, and it would certainly follow from one source or the other, so that after 10 more years the same issues might be back before the Supreme Court.

If new legislation is adopted, I would hope that it would be in broad, simple terms, along the lines indicated in the administration's proposal. There should not be an effort, and if it were made it would be futile, to enunciate what should be in and the multiple instances where problems would be encountered, in applying such legislation. But, the philosophy underlying the legislation, the policy underlying the legislation if it were adopted, should certainly be set out fully in the committee reports for the guidance of the administrators.

I think that the basic policy of charity, the question of public interest, and public welfare, has to be the undergirding for decisions in this area. In looking for a silver lining to the cloud of confusion that we now have, I think that the attention that is being given to this question as by this committee today will contribute to a better understanding on the part of all as to the manner in which responsibilities in administering the very important law of charity in the Federal area will be governed in the years to come.

Thank you, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF RANDOLPH W. THROWER

Mr. Chairman, my name is Randolph Thrower. I am a practicing lawyer and a member of a law firm in Atlanta, Georgia and Washington, D. C. I appreciate the invitation to testify before this Committee.

I was serving as Commissioner of Internal Revenue in 1970 at the time of the announcement by the Service that it would no longer recognize as tax exempt racially discriminatory private schools. It may be that careful examination of what was done at that time, reflection upon why it was done, and a review of federal court actions during the past decade with respect to the Service's policies will contribute to a proper resolution of the issues we face today. Also, let me acknowledge at the outset that one could follow our course of study and reasoning and perhaps reach a different conclusion. The issue had been under study within the Service since at least as early as the late 1950's. Able lawyers within government in 1970 differed in their views on the subject. My comments will be directed toward an explanation of the prevailing view. Although one is expected to protect his own progeny, I will strive to be as objective as possible in my review.

I.

EVENTS PRECEDING 1970 ANNOUNCEMENT

Although the result reached in 1970 may not at that time have been an obvious one, it is unfortunate that the public record may have permitted the assumption by some, both now and then, that the decision to deny recognition of tax exempt status to racially discriminatory private schools was an arbitrary and perhaps even hasty decision by the Commissioner. Nothing could be further from the fact. Probably no other decision made by me during my administration received as much study and attention as this one from so many people in so many different departments and agencies of Government, including several offices in the White House and the President himself.

Nor was it a knee jerk reaction to problems of the moment. Pressures to recognize the propriety, and, indeed, the necessity for this action, had been building for years. Many events, including the decision in Brown v. Board of Education* and the Civil Rights Act of 1964, focused our attention upon the nation's interest and concern about racial discrimination in education. The Brown case dealt with constitutional mandates to the states; the Civil Rights Act, with directives in the Federal sphere. The implementation of these decisions in the decade of the 60's, and the fact that so many existing and newly formed private schools were absorbing white students from school districts integrated under court order, made it impossible for the Internal Revenue Service to avoid facing squarely the issue as to whether it could legally support the existing practice of recognizing tax exemption and, more importantly, the deductibility of contributions, to racially discriminatory private schools.

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*347 U.S. 483 (1954).

The Service, under my predecessor, Sheldon Cohen, had wrestled with this problem. Because of the unanswered questions in this area, from 1965 to 1967 the Service suspended the issuance of rulings to private schools applying for exemption where a factor of racial discrimination seemed involved, and during this time it continued study of the problem. Under what has been described to me as substantial pressure from certain segments of Congress, however, the Service concluded this suspension on August 2, 1967, and resumed issuing rulings, but subject to a new policy. Simply stated - perhaps too simply - the Service announced that no racially discriminatory private school would be considered entitled to exemption, or the benefit of deductibility of contributions by its patrons, where such school had received special state or local governmental aid, as, for example, free textbooks, tuition grants and the like.* I assume that the reasoning of this position was that such overt state financial support for a racially discriminatory private institution would be clearly violative of the 14th Amendment and could not legally be supplemented by further financial support from the Federal Government through tax exemption and deductibility of contributions.

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*IRS News Release, August 2, 1967.

The adoption of this position did little more, however, than buy time for continued study. The Service still faced the more critical question of whether, in light of constitutional and statutory inhibitions, Section 501(c)(3) should or legally could be construed to permit this kind of financial support for private schools which were pervasively discriminatory on the basis of race. And, of course, by "pervasive" discrimination, which was an expression I used at the time, we meant something clear and absolute, characterized by a clear policy of "No Admittance."

The Tax Reform Act of 1969 accelerated the pace of study with respect to the entire field of tax exempt charitable organizations. In fulfilling the express requirements and expectations of Congress, new demands were placed on all charities from churches and educational institutions to private foundations, and the Congress greatly broadened its expectations with respect to the role of the Service in such matters. This Committee and the Senate Finance Committee recognized, however, that the new laws applicable to charities would require the Commissioner to exercise considerable discretion with respect to broad philosophical and social problems, and that the administration of these laws required not just technical and legal skills but also an understanding of the philosophy undergirding the statutory provisions. You thus encouraged the creation of an Advisory Committee on Exempt Organizations with which the Commissioner and his staff could consult in the intensification of the program to secure compliance with the tax laws and requirements for exemption in the charitable area. This Advisory Committee included distinguished theologians from several faiths, educators, business persons, minority representatives, a Senior Judge, and other dedicated men and women. With the help of this Committee, we began to deal with some of the most difficult problems ever faced by the Service, in most cases involving the need to measure the relative weight of conflicting values.

As we well appreciated at the time, the responsibility of the Service is not to create new laws, but rather to implement and enforce the applicable laws. The Service neither grants nor denies exemptions. In the application of the statutory provisions with which we are here concerned, its function is to determine factually and legally whether a particular organization or a particular contribution comes within one of the prescribed classes of organizations or one of the prescribed classes of contributions described in the statutory provisions. It is the Congress that grants the exemption, and access to the courts is available to any institution which takes the position that the Service has erroneously failed to recognize its right to an exemption provided by Congress. Granting exemptions is a matter of legislative grace on the part of Congress and it can readily withdraw the right to exemption.

Thus, with the Advisory Committee we began to delve into the history of the Internal Revenue laws dealing with charities, as well as the development of the law of charities under the English Common Law and within the United States. We noted that the special privileges accorded to the three principal branches of charity, i.e., public welfare, religion and education, had a long history that was finally formalized in the English Statute of Charitable Uses, enacted in 1601. The usual privileges accorded charities were greatly extended under our Internal Revenue Laws. Under these laws private charity has flourished in this nation to a degree probably unmatched in any other nation in the world. Throughout this history "charity" was used both as a narrow term denoting public welfare, as the provision of alms for the poor, and also as a broad term encompassing religion, education, public welfare and other programs of exclusively public interest and benefit.* Hence, we speak in the narrow sense of donations to the poor as charity and in the broad sense of donations to churches or educational institutions as charitable contributions.**

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* Section 501(c)(3) tracks the legal definition of a charity which was set forth by Lord Macnaghten in Commissioners v. Pensel, [1891] A.C. 531, 583, and which has been recognized in Anglo-American law (Evans v. Newton, 382 U.S. 296, 307-308 (1966) (White, J., concurring)):

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

A history of the period states that "[p]ublic benefit was the key to the [s]tatute of Charitable Uses." Gareth Jones, History of the Law of the Charity 1532-1827, p. 27 (London: Cambridge University Press, 1969).

** Section 170(c) expressly defines the term "charitable contribution" as including a gift to a corporation, trust, fund or foundation which is organized and operated for "religious, charitable, scientific, literary, or educational purposes . . . . "

In our study together my staff and I and the members of the Advisory Committee were impressed with the fact that for the past several hundred years the legislative definitions of charity have followed the broad terms of the Statute of Charitable Uses, generally without attempting further definition. From century to century what was charitable had to be determined by reference to current standards. Actions, no matter how well motivated, which, according to standards of the day, were illegal, antisocial or in conflict with clearly developed public policy, were not deemed to be charitable.* This concept was recognized and followed in our deliberations with the Advisory Committee.** It would be ludicrous to apply the laws of charity without this guiding light. To use a classic example, without this standard, one might feel required to recognize as tax exempt Feagin's school for pickpockets, provided it qualified in all other respects. And direct aid to needy people supportive of an organized effort to violate the law could otherwise be deemed charitable.

These principles were well recognized by us as we approached the explosive issue of private schools. We realized that no agency of government or group of persons could claim a corner on the knowledge and wisdom required for resolution of this question. I cannot recall all of the contributors to our deliberations, but before we concluded, the list included many from the Treasury, the Department of Justice, the Department of Health Education and Welfare, and the White House. Keen interest in our study was shown by the heads of those Departments, by the Solicitor General and by the President. It is my recollection that the Secretary of the Treasury, the Attorney General, and many other officials in these two departments, personally reviewed and approved our final decision and our analysis of the grounds on which it was placed.

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* See, e.g., Ould v. Washington Hospital for Foundlings, 95 U.S. 303 (1877); Girard Trust Co. v. Commissioner, 122 F.2d 108 (3d Cir. 1941).

**That Congress intended to adopt the broad common law concept of charities is reflected in income tax regulations, published rulings of the Service and decisional law. (See Treas. Reg. §§ 1.501(c)(3)-1(d)(2) and (3); Rev. Rul. 67-325, 1967-2 C.B. 113, 116; Henry C. Dubois, 31 B.T.A. 239 (1934); Horace Heidt Foundation v. U.S., 170 F.Supp. 634 (Ct. Cl. 1959); The Founding Church of Scientology v. U.S., 412 F.2d 1197 (Ct. Cl. 1969); Amy Hutchinson Crellin, 46 B.T.A. 1152 (1942).

We ultimately concluded within the Internal Revenue Service that the decision to deny recognition of exemption to racially discriminatory private schools was compelled by law. It involved an issue whose time for resolution had come. We could no longer maintain the incongruity of treating as contaminated a racially discriminatory private school which had received state or local aid while, in effect, approving much more substantial Federal aid to other discriminatory schools. All of our consultants recognized that the provision of such financial benefits raised serious constitutional questions. We could not attribute to the Congress an intent to violate the Constitution, and thus we felt compelled to search for a reasonable construction of section 501(c)(3) which would avoid a constitutional confrontation. Before and since that time, the Service has attempted to construe the charitable provisions of the Code as broadly and objectively as possible in order to permit the private sector to exercise wide choices directed by great differences of opinion as to what is charitable. For example, two educational efforts could have directly opposite teachings and yet both further public understanding of a serious subject matter and thus both be deemed charitable.

In construing and applying the provisions of section 501(c)(3) the Service, unless expressly directed otherwise by legislation, has generally attributed to Congress an intent to maintain a position of neutrality within this very broad field of charity, with the broad and liberal standard of what serves the public welfare, to use words found in the early congressional legislative history,* and with the outer limits of this standard exceeded only when activities were found to be illegal, antisocial, against clearly defined public policy, or merely frivolous. However, as important as it is for the Federal Government to maintain neutrality toward religious organizations, educational institutions and other charitable institutions, we concluded that we could not attribute to Congress an intent to be neutral in supplying financial assistance to racially discriminatory private schools. Negatively, it could be said that we would not attribute to Congress an intent to challenge constitutional inhibitions against government financial support for pervasive racial discrimination. More affirmatively, and as a basis for a positive program, we concluded that pervasive racial discrimination was simply not charitable within the meaning and intent of the Internal Revenue Code.

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*H. Rep. 1860, 75th Cong., 3d Sess. (Jan 14, 1938).

II.

THE 1970 POLICY

In the midst of these deliberations, the Lawyers Committee for Civil Rights launched in the United States District Court for the District of Columbia the suit of Green v. Kennedy, Thrower et al. This case has borne the names of successive Treasury Secretaries and Commissioners since that time. It was brought on behalf of several black parents and their children attending public schools in Mississippi to challenge the granting of tax exempt status to private segregated schools in Mississippi.* Because final decisions had not yet been reached within the Service on the merits of the issues raised by this case, it was defended in the District Court by the Department of Justice, the Service's legal representative in the Federal Courts.

As to the issue of standing of the plaintiffs to bring the action, the Service and the Department had long attempted, usually with success, to confine tax litigation to parties directly affected by the tax, that is, to taxpayers themselves. Even with these limitations, the ever growing volume of tax litigation threatened to become overwhelming; if the courts permitted persons to litigate about the tax liabilities of other taxpayers, no limit could be seen to the number of cases which would arise in the courts. Thus, the Department initially resisted the suit both on the merits and on the issue of standing.

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*Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970).

We were disappointed that we were not able to develop an acceptable solution to the problem prior to the initiation of the Green litigation. We had recognized that, without a modification of the Service's policy, litigation might ensue which would threaten to place the burden of administration of the admissions policies of private schools on the courts for the next decade, or more, as had occurred with so many public schools during the decade of the 60's. After careful study, lawyers from the Department of Justice, lead principally by the Assistant Attorney General in charge of the Tax Division, advised us that we most likely would lose the Green case both on the issue of standing and on the merits.*

By this time it seemed apparent that the only responsible course for us to take was to announce the 1970 policy with which you are familiar.** Had it been announced and in operation a few months earlier, there might have been no need to have kept the private schools of Mississippi before the courts for the past ten years. Had its announcement not been made when it was, many other states, like Mississippi, might have found the admissions policies of their private schools under the active surveillance and control of the Federal Courts.

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* By order of the court issued on January 12, 1970, the Service was, in fact, enjoined from approving any further application for exemption by any private school located in Mississippi, or determining that contributions to such schools were deductible, unless we first affirmatively determined pursuant to procedures satisfactory to the court that the applicant school "is not part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated public schools." Green v. Kennedy, supra at 1140. By further order of June 26, 1970, the Service was ordered to suspend advance assurance of deductibility of contributions for 41 private schools in Mississippi which already had received favorable ruling letters. Green v. Kennedy, 70-2 U.S.T.C. ¶ 9600 (D.D.C. 1970).

**IRS News Release, July 10, 1970, and IRS News Release, July 19, 1970.

The policy announced in 1970 was simple, clear and direct. A school would not be recognized as entitled to tax exempt status, nor its patrons to the deduction of contributions, unless it demonstrated, by its past and continued performance or by present and continued declarations, that it was open to the admission of students of all races. It was made clear that a racially nondiscriminatory admissions policy meant admission without discrimination to all the rights and privileges generally accorded to other students.

The advent of this new policy was announced at the White House and the policy itself was announced at the Service. As I recall those turbulent days, the announcement met generally with widespread approval, but also with bitter and highly vocal protests from both ends of the political and social spectrums -- from those who were convinced we had gone much too far and those equally convinced that we had not gone far enough. However, the announced policy was the subject of discussion at several Congressional Committee Hearings which I attended, and I do not recall any suggestion from Members of Congress at those hearings that the Service had gone beyond the intent of Congress in taking this action.

The Court in the Green case, after carefully reviewing the new policy and largely approving its content and implementation, concluded that additional supervision was necessary for the

the private schools in Mississippi because of the history of state-supported segregation in Mississippi."*

Most lawyers going through this same process of analysis which I have described, taking into account constitutional restraints on governmental support of racial discrimination, the acts of Congress relating to the subject and the many court decisions in the area, would, I believe, come to the same result reached by us. At the present time, no one could fail to recognize that the Federal Court decisions in cases where the legality of the policy has been challenged confirm the correctness of the 1970 decision.** The United States Supreme Court, however,

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* Green v. Connally, 330 F. Supp. 1150, 1173 (1971), aff'd without opinion sub. nom., Coit v. Green, 404 U.S. 997 (1971). The court required the Service, before recognizing exemption, to secure from Mississippi private schools more explicit assurance of communication of the school's nondiscriminatory policy to the community. In addition, the court required submission of objective information to the Service, including a racial breakdown of students attending and applying, the disposition of available scholarships and loan funds, and a racial breakdown of faculty and administrative staff. The court also required disclosure of the school's incorporators, founders, board members and donors, and information as to whether any of the foregoing were identified with or active members in an organization having as a primary objective the maintenance of a segregated school education. Id. at 1179-80. However, the court stated that these additional requirements did not establish "substantive criteria" but rather were to assure that the Service had sufficient information at hand to accurately certify the nondiscriminatory operation of the school.

**Green v. Connally, supra; Bob Jones University v. U.S., 639 F.2d 147 (4th Cir. 1980), rehearing and rehearing en banc denied April 18, 1981; Goldsboro Christian Schools, Inc. v. U.S., 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd, ____ F.2d _____ (4th Cir. 1981); Prince Edward School Foundation v. U.S., 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order No. 79-1622 (D.C. Cir. June 30, 1980), cert denied,

[Footnote continued on next page]

has not yet had the question squarely before it in a fully argued adversarial proceeding. The Bob Jones University and Goldsboro Christian Schools cases now pending in the Supreme Court would provide that opportunity. At the present time, as all know, the continuation of those cases appears uncertain at best. As I will discuss more fully in a moment, the movement of the Bob Jones and Goldsboro cases to final decision in the Supreme Court would contribute a great deal, I believe, to a resolution of the problem which the Congress and the Administration now face.

It may be useful at this point to make the observation that many people expected a great deal more from the 1970 program than it could reasonably have produced. First, as to what it might have been expected to do and has done. It was expected in short order to remove the "No Admittance" sign hung on the doors of many private secondary schools that barred entrance to certain students solely because of their race. This was accomplished almost overnight. Some schools had been desirous of making the move because it seemed right and proper and they

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[Footnote continued from previous page]

* _____ U.S. _____, 101 S.Ct. 1408, 62 L.Ed.2d 376 (1981). See also Bob Jones University v. Simons, 416 U.S. 725, 748-49 (1974). The Supreme Court also has decided that schools with racially discriminatory policies and practices are not entitled to other governmental, non-tax benefits. Norwood v. Harrison, 413 U.S. 455 (1973) (state provision of textbooks to segregated private schools constitutionally inpermissable); Brumfield v. Dodd, 405 F. Supp. 338 (E.D.La. 1975) (similar state program invalidated). See also Runyon v. McCrary, 427 U.S. 160 (1976) (42 U.S.C. § 1981 prohibits private, nonsectarian schools from denying admission to students on the basis of race).

used this announcement as an impetus to accelerate the change. Some, I assume, changed solely to preserve tax benefits. With very few exceptions all private schools then recognized as exempt or seeking exemption quickly revised their corporate charters and by-laws, where needed, and began a practice of periodic public announcements of an open admissions policy.*

We announced that, regardless of a school's record or background, we would assume that these declarations and publications were made in good faith unless the contrary were shown. Consistent with general I.R.S. policy, every school was given an opportunity to "wipe the slate clean" and make a "fresh start" under the newly announced procedures. We recognized that it would be difficult for the Service to determine the good faith of these declarations by private schools unless demonstrations of bad faith were reported to the Service by people in the community. The denial of application for admission from qualified minority students would, of course, provide the best evidence of bad faith.

We did not view the policy as having the potential for creating any large movement of minority students into private schools which theretofore had barred their admission. Our concept was that the new rules merely created accessibility. This concept was approved in another context by a District Court

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**Furthermore, in response to the Service's policy, many associations of private secondary schools, certain of these in the South, adopted rules baring membership to discriminatory schools.

Judge in Norwood v. Harrison, 382 F.Supp. 921, 926 (W.D. Miss. 1974) who stated that "the ultimate issue is not whether black students are actually enrolled, but whether their absence is because the school has restrictively denied their access; . . ."

III.

THE SERVICE'S 1978 PROPOSALS

Some private schools in rural areas of the South have been advertising an open admissions policy for ten years and yet have never received an application from a black child. This has led to frustration and disappointment from those who expected more from the Service's program. It was this, perhaps, which led the Service in 1978, under pressure of the continuing Green case and other existing or threatened litigation,* to propose for comment new guidelines on the subject.** The proposed new guidelines were seen by many as imposing an affirmative action program, with quotas to be met, on many private schools formed or expanded at the time of court ordered integration in their communities. This emphasis upon the time and circumstances of the formation of the school, and the creation of presumptions against certain schools because of their historical origins, would have effectively withdrawn the assurance of a "fresh start" given in 1970.

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* On July 23, 1976, the Green plaintiffs reopened their case, asserting that the Service was not complying with the court's continuing injunction against tax exemption for racially discriminatory private schools in Mississippi. One week later, an action was commenced in the same district court on behalf of a number of parents in states across the country, seeking relief on a nationwide basis similar to that sought with respect to Mississippi in the reopened Green case (Wright v. Miller).

**43 Fed. Reg. 37296 (August 22, 1978).

The extent of the reaction against this set of proposals was unprecedented in the history of the Service. Emotions ran so high that the later announcement of more moderate rules* was hardly noticed. Thereafter Congress, through amendments to appropriations acts and continuing resolutions, blocked implementation of the 1978 and 1979 proposed guidelines, as well as any guidelines not in effect prior to August 22, 1978, which would cause private, religious or church related schools to lose tax exempt status under section 501(c)(3).**

On May 5, 1980, however, notwithstanding the Congressional prohibition against expending funds to implement the Service's own guidelines, the District Court for the District of Columbia modified and supplemented its original injunction in the Green litigation, requiring the Service to implement procedures beyond those permitted under pre-1978 guidelines. Green v. Miller, 80-1 U.S.T.C. ¶ 9401 (D.D.C. 1980) ("Green II").*** Thus, the

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*44 Fed. Reg. 9451 (Feb. 13, 1979).

**Treasury Department Appropriations Act of 1980, §§ 103, 614 and 615. Similar limitations have been included by continuing resolution as to fiscal years 1981 and 1982.

***Under Green II, as under the 1978 procedure, evidence that a school was previously adjudicated discriminatory or established or expanded at the time of public school desegregation raises an inference that the school in facts operates on a discriminatory basis. Unlike the 1978 proposed procedure, however, Green II contemplates no mechanical numbers test to determine discrimination. Instead, the court has stressed factors to be reviewed by the Service in determining whether a school in fact discriminates.

Service is presently in the position of being prohibited by one branch of the government to act while being ordered to do so by another. The end result is a dual system: one method of review for Mississippi schools based on Green II, and another method for the rest of the country based, until recently, on procedures in effect prior to August 22, 1978, and now on no policy whatsoever.

Shortly after the announcement of the first set of proposals in 1978, my firm was asked to advise with the officials of a private school in a rural South Georgia community where the school was considered a valuable asset in attracting and retaining national and international businesses and their personnel. We were advised that the school had adopted and advertised in good faith an open admissions policy since 1970, but had never had a black applicant. We secured authorization from the school to commission a survey of the attitudes and perceptions of blacks in the county toward the private school. This survey was conducted by an independent, objective, academically-oriented research organization, the Center for Research & Social Change of Emory University, in Atlanta, Georgia. The field work was done by three black graduate students who were experienced interviewers. Although the status of the school had not been challenged, the results of this survey were turned over to the Service for its information as to the attitudes that probably would be found with respect to private schools in many rural communities of the South.

The results of the survey demonstrated that the black community in this county, on the whole, had no interest whatsoever in the enrollment of their children in the private school. They showed a strong commitment to the public school system and perceived its academic offerings to be superior to that of the private school, even though the contrary was indicated by the usual objective criteria. Some Blacks were uncertain about the sincerity of the school's open admissions policy and others viewed it as competitive with the public schools, in which the Blacks were active and shared in the leadership and control. In fact, earlier in the year, apparently in response to the proposed IRS guidelines, leaflets had been distributed in the black community and radio time had been obtained to discourage any black support for the private school. The school thus learned from this survey that for the foreseeable future a prolonged program of cultivation would be required to overcome these attitudes so as to enroll even a minimal number of minority students.

In short, the 1970 program was able to guarantee accessibility to schools having tax exemptions but for many private schools it could not produce the minority attendance that many would have hoped for.

Let me add at this point that it was not intended that the policy against discriminatory admissions would be applied without regard to the social interests served by a school's admissions policy. For example, we were not prepared to rule that schools specially designed to serve the needs of certain groups of disadvantaged children - such as a school for Indian children on an Indian reservation, or a school to aid in the language and cultural adjustments of Vietnamese children coming to the United States - were not entitled to tax exempt status. Such distinctions grow out of clearly perceived national interests and policies identified by the Service, not created by it.

We also recognized in 1970 that the application of the new standards to religious schools could move us into a thorny thicket. Difficult questions arise when the First Amendment rights to freedom of religion appear to clash with other important constitutional principles. We did conclude, however, that the mere fact of a relationship to a church or other religious organization could not throw the mantle of the First Amendment around a racially discriminatory private school. More difficult questions arise where apparently sincere and long held religious beliefs affect policies of a school which assertedly are applied indiscriminately to members of all races. Such questions were left to my successors. One such question will be before the Supreme Court in Bob Jones University, and perhaps in the Goldsboro case as well, if those cases are not mooted.

IV.

RESOLUTION OF ISSUES

The private school issue is now caught in a procedural tangle. Leaders of the present Administration feel that a prior Administration's fully considered action was not legally justified, but have taken the position that its objectives were worthwhile and should be sought by legislation. Yet, the present Administration has sought to withdraw from the United States Supreme Court the question of legal justification, or perhaps constitutional compulsion, for the earlier action. This raises the question whether Congress could deal more effectively with the subject after having the Court's decisions before it? It is my opinion that it could.

The need for early review and decision by the Supreme Court is especially acute with respect to the potential conflict between First and Fifth Amendment rights before the Court in the Bob Jones and Goldsboro cases. The Court will presumably reach this issue if it decides that the 1970 policy was otherwise legally justified or required. Should these cases not go to decision and Congress enact the Administration's bill, these and other similarly disposed religious schools would certainly relitigate the issue in the future and, after years of uncertainty, would be back before the Supreme Court asserting that racial discrimination in their practices is protected by the First Amendment guarantee of freedom of religion. This loss of time, this extension of uncertainty, this imposition on the schools themselves, seems unnecessary and avoidable by continuing the defense of the present appeals in the Supreme Court.

V.

LEGISLATIVE POLICY

I, of course, disagree with the current advice of the Justice Department that the authority which the Service previously relied upon as the basis for revoking the tax exemptions of racially discriminatory schools "is not supported by the language of the Internal Revenue Code or its legislative history."* The Justice Departments of several administrations, every federal appellate court which has considered the issue, and, inferentially, the United States Supreme Court, have all concluded that the Service is compelled by the applicable laws to deny tax exempt status to racially discriminatory educational institutions. Indeed, the thrust of the federal court decisions to date has been that the Service has not gone far enough in the implementation of the Code restrictions! Finally, this Congress has clearly demonstrated its recognition of the national policy against racial discrimination by denying tax exemption under Code section 501(i) to social clubs which practice racial discrimination.** Even in its recent actions barring implementation of the 1978 and 1979 Service guidelines for private schools, Congress made clear that it intended for the pre-1978 guidelines to remain in effect, thus indicating its quarrel with the proposed extension rather than the existing guidelines.*

Nevertheless, Congress might well wish to legislate on this subject, even if the Bob Jones and Goldsboro cases are decided in the Supreme Court and the 1970 policy is upheld.** If so, it

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* Treasury News, January 8, 1982.

**In its description of the reasons for adding section 501(i) to the Code, the Senate Finance Committee cites Green v. Connally for the proposition that discrimination on the basis of race is inconsistent with an educational institution's tax exempt status and also its status as a charitable contribution donee. S. Rep. No. 94-1318, 1976-2 C.B. 597, 601, n.5. The purpose of section 501(i), according to the Committee, was to conform the rules with respect to social clubs to "national policy." 1976-2 C.B. 601.

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*With respect to his amendment which became Section 615 of the Treasury Department Appropriations Act of 1980, Representative Dornan stated,

> "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." 125 Cong. Rec. H5982 (daily edition, July 16, 1979).

Representative Ashbrook also submitted an amendment to the Act which became Section 103, stating, would seem desirable that any such legislation be drafted in broad and simple terms, as in the Administration's proposal, and that the purposes and intent of the Congress, and its philosophy in enacting the legislation, be fully set forth in your Committee reports for the guidance of the Service in administering the law. Charity is a very broad and ever changing concept. Prevailing views as to what is charity in one generation may change markedly in succeeding generations. All of this cannot be successfully captured in detailed legislative provisions. The administrator must exercise broad discretions in applying legislative intent to the ever growing and shifting concepts of charity under the internal revenue laws. The active Congressional oversight traditionally exercised with respect to the administration of the Internal Revenue laws should provide assurance that the Service will be put on notice if it appears to be departing from legislative intent.

> "My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched. . . . My colleagues surely know that existing revenue procedure 7550 [sic] would be in effect." 125 Cong. Rec. H5879, 5882 (daily edition, July 13, 1979).

The Ashbrook amendment was later introduced in the Senate by Senator Helms who stated,

> "Under my amendment, the IRS may still move to withdraw the tax exemption status of a school which has failed to meet the standards of Revenue Procedure 75-50. . . . In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis." 125 Cong. Rec. 511979 (daily edition, September 6, 1979).

**Indeed, the need for, and the form of, legislation may well be significantly affected by the Court's decisions in those cases.

In any case, it is certain that any new legislation will be challenged in the courts and subjected to the strictest scrutiny. For this reason, it would seem useful for the Committee to widely circulate all proposals and provide ample opportunity for review and comment by all interested parties prior to enactment.

VI.

CONCLUSION

I think we would all agree that private charity, including religion and private education, are extremely important elements in our society, and questions affecting them should be approached by the Congress, the executive branch of government and the Courts only with the highest sense of public responsibility. Knowing that all concerned are governed by this common interest, I have no doubt that the final resolution of the questions now faced will advance the cause of private charity in the years to come.

Randolph W. Thrower

Chairman ROSTENKOWSKI. Mr. Kurtz.

STATEMENT OF JEROME KURTZ, FORMER COMMISSIONER, INTERNAL REVENUE SERVICE

Mr. KURTZ. Mr. Chairman, members of the committee, I am now a practicing lawyer in Washington, D.C. I was Commissioner of Internal Revenue from early 1977 until the fall of 1980. The background of this controversy has been fully set forth by other witnesses and I have joined in a statement to be submitted for the record by a group of tax lawyers, so I will limit my remarks to just a few comments that I think bear emphasis.

Administration witnesses assert as the basis for their interpretation of present law, that the words of the Internal Revenue Code, read literally, do not contain any limitation of the tax exemption accorded educational organizations.

Deputy Attorney General Schmultz stated in his testimony before the Finance Committee last week that:

> Congress, by separately enumerating eight distinct purposes and functions entitling nonprofit corporations to tax exempt treatment and by joining them in the disjunctive word "or", manifested a clear intent to accord tax exempt status to any entity organized and operated for any one of the enumerated purposes.

Judge Leventhal, speaking for a unanimous three judge court in the *Green* case considered the same statutory language and argument and dismissed it concluding that educational organizations cannot be considered exempt if operated contrary to public policy.

He said, as Mr. Thrower just quoted and I quote Judge Leventhal, "Otherwise, for example, Fagin's School for Pickpockets would qualify for a charitable trust."

I ask whether under the administration's view of the law Fagin's School for Pickpockets is now entitled to a tax exemption and contributors to it to a tax deduction? It defies reason to think that the law requires or permits such an absurd result. But for the same reason that the school for pickpockets is not exempt—that while it teaches something and therefore is literally educational, its operation violates public policy—so segregated schools are not entitled to exemption because they violate public policy equally.

The administration would have us believe that the position of the Internal Revenue Service denying tax exemption for segregated schools represented an arbitrary usurpation of congressional power. Mr. Schmultz says, "There is neither a constitutional nor statutory basis for the practice followed by the service since 1970."

Deputy Secretary McNamar said in his Senate testimony, "Should administrators of the law be free to define public policy in the absence of legislative authority duly enacted by Congress? Again, the answer is no."

The position of the Internal Revenue Service was not only permitted but was required by court decision. The Court in *Green* ordered the IRS to deny tax exemptions to segregated schools. After the service revised its policy to do so, the Court noted it did not want to leave the future interpretation of 501(C)(3) to shifting administrative winds and therefore specifically issued a declaratory order which stated and I quote, "501(C)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and section 170(a)-(c) of the code, does not provide a deduction for a contribution to any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students."

That is quoting from the courts declaratory relief. The *Green* court order which was issued in connection with that case is still in effect, with subsequent modifications. The case was affirmed by the Supreme Court. I cannot understand how it can be ignored, nor how the IRS can be described as acting arbitrarily. To have acted otherwise in the face of the *Green* court order would have been to have acted in contempt of court. Moreover, every case in which the courts have considered the issue of the propriety of denying tax exemptions to segregated schools has supported such denial. On the other hand, there is nothing to support the administration's interpretation of the law. The only authority I have seen cited in the papers filed by this administration is a reference to the lower court opinion in *Bob Jones* cited by Mr. McNamar, which opinion was reversed on appeal.

Administration witnesses refer repeatedly in their testimony to the impropriety of administrators making social policy or legislating. Every administrative agency and particularly one dealing with a law as complex as our tax law, must interpret the law which Congress gives it to administer.

Many interpretations which it is forced to make may be characterized as affecting social policy. It is not as if deciding one way makes social policy and deciding the other way does not make social policy. If the IRS is faced with the question of whether a certain type of corporate combination is taxable or tax free, and the statute is not explicit, it must make a decision one way or the other. If it decides tax free, it may be viewed as encouraging corporate combination; if it decides taxable, as discouraging them.

In either case, the decision may have an effect on competition and may be viewed as making social policy. The IRS would make social policy by granting tax exemptions to segregated schools as well as by denying it. This administration is doing the same by its interpretation of the law. The difference is that the IRS interpretation is not only supported by, but required by, the courts. The administration's social policy is lawless. If the administration wants to be certain what the existing law means, it should let the Supreme Court decide the cases it has before, the *Goldsboro* and *Bob Jones* cases.

Thank you.

[The prepared statement follows:]

STATEMENT OF JEROME KURTZ

Since the background of the controversy concerning tax exemption for segregated schools is fully set forth in the pamphlet prepared for these hearings by the staff of the Joint Committee on Taxation and since I have joined in a statement submitted for the record by a group of tax lawyers, I will limit my remarks here to a few points that, I believe, warrant emphasis.

1. Administration witnesses assert as the basis for their interpretation of present law that the words of the Internal Revenue Code, read literally, do not contain any limitation of the tax exemption accorded educational organizations. Deputy Attorney General Schmults stated in his testimony before the Senate Finance Committee last Monday:

> Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive word "or", manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions.

Judge Leventhal, speaking for a unanimous three-judge court in Green v. Connally, considered this same statutory language and dismissed the interpretation proposed by Mr. Schmults, concluding that educational organizations cannot be considered exempt if operated contrary to public policy. He said, "Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust."

I ask whether, under the Administration's view of the law, Fagin's school for pickpockets is now entitled to tax exemption -- and contributors to it, to a tax deduction? It defies reason to think that the law requires or permits such an absurd result. For the same reason that the school for pickpockets is not exempt -- that while it teaches something and therefore is literally educational, its operation violates public policy -- so segregated schools are not entitled to exemption under existing law.

2. The Administration would have us believe that the position of the Internal Revenue Service denying tax exemption for segregated schools represented an arbitrary usurpation of Congressional power. Mr. Schmults says "there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970." Deputy Secretary McNamar said in his Senate testimony, "Should administrators ... of the law be free to define 'public policy' in the absence of legislative authority duly enacted by Congress? Again, the answer is 'no'."

The position of the Internal Revenue Service was not only permitted but required by Court decisions. The Court in Green ordered the IRS to deny tax exemptions to segregated schools. After the Service issued a press release describing its policy during the pendency of the Green case, the Court nevertheless issued its order:

> I. Declaratory Relief
>
> Declared that:
>
> A. Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170(a)-(c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students.

The Green Court's order is still in effect (with subsequent modifications). The case was affirmed by the Supreme Court. I don't understand how it can be ignored, nor how the IRS can be described as acting arbitrarily. Moreover, every case in which the courts have considered the issue of the propriety of denying tax exemption to segregated schools has supported such denial. On the other hand. there is nothing to support the Administration's interpretation of the law. The only authority I've seen cited is the lower court opinion in Bob Jones, cited by Mr. McNamar, which was reversed on appeal.

3. Administration witnesses refer repeatedly in their testimony to the impropriety of administrators making "social policy" and "legislating." Every administrative agency, and particularly one dealing with a law as complex as our tax law, must interpret the law which

Congress gives it to administer. Many interpretations which it is forced to make may be characterized as affecting social policy. There is no way out of it. It is not as if deciding one way makes social policy and the other way is socially neutral. If the IRS is faced with a question of whether a certain type of corporate combination is taxable or tax-free and the statute is not explicit, it must make a decision -- one way or the other. If it decides tax-free, it may be viewed as encouraging corporate combinations; if it decides taxable, as discouraging corporate combinations. In either case, its decision may have an effect on competition and may be viewed as "making social policy." The IRS would "make social policy" as well by granting exemption to segregated schools as by denying it. This Administration is just as surely making social policy by its interpretation of the law as was the IRS. The difference is that the IRS interpretation was not only supported by -- but required by -- the courts. The Administration's social policy is lawless.

4. If the Administration wants to be certain what the existing law means, rather than acting by fiat, it should let the Supreme Court decide the cases it has before it -- Bob Jones and Goldsboro.

Chairman Rostenkowski. Thank you. Mr. Ferguson.

STATEMENT OF M. CARR FERGUSON, FORMER ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE

Mr. Ferguson. I am grateful to the committee for holding today's hearing and giving me an opportunity to offer comments. From May 1977 until January 1981, I served as Assistant Attorney General in charge of the Tax Division of the Department of Justice and as such, was in charge of the preparation and presentation of the Government's case in the *Bob Jones,* and *Goldsboro* cases and also in the District Court for the District of Columbia cases, *Green* and *Wright,* which have been discussed this morning.

The position which we took in those cases, I felt, was consistent with the Federal tax laws now on the books as interpreted by every Federal appellate court, including those decisions. That law prohibits Federal tax-exempt benefits for schools with racially discriminatory policies. Accordingly it seems to me that new legislation is not needed to sustain the Government's consistent position in the last decade that such private schools do not qualify as tax exempt organizations under section 501C3 of the Internal Revenue Code.

The Government's position as explained by Commissioners Thrower and Kurtz did not stem either from administrative fiat of the Internal Revenue Service or the more recent judicial activity. The three-judge District Court of the District of Columbia, in January 1970, had the unavoidable choice of either upholding or extending tax exempt status to such schools or denying it.

Judge Leventhal's careful and learned opinion, which was solidly rooted on the common law of charitable trusts, concluded that the tax exemption was not available to them as a matter of law under the very statute now being interpreted by the current administration in an opposite way.

As Commissioner Thrower explained as a consequence of the temporary restraining order on the *Green* case the administration in 1970 took stock of its position and on the basis of the authorities referred to by the Court, the legal staffs of both the Justice and Treasury Departments advised President Nixon that allowing tax-exempt benefits to racially discriminatory schools was almost certainly illegal and very likely unconstitutional.

Acting on this advice the President ordered the Internal Revenue Service to cease issuing favorable rulings to racially discriminatory schools. Necessarily this required determining what amounted to racial discrimination for purposes of administering this interpretation.

The *Green* court, in 1970, however did not then dismiss the case as moot or withhold action in reliance on the Service's public undertaking to enforce nondiscriminatory policies. Instead the Court issued a permanent injunction detailing the terms of IRS enforcement of the nondiscrimination policies in Mississippi and declaring that the tax laws mandated a similar policy nationwide.

Segregated white private schools intervening in the case challenged the constitutionality of the opinion and the order on direct appeal to the Supreme Court. That was a hotly contested case. Their arguments were rejected as well as the contention of the

Service that the courts had no jurisdiction in the case, by Affirmance of the Supreme Court of the lower court's injunction.

Within the next few years the soundness of the *Green* opinion was accepted by Federal courts across the country as our first panel I think quite clearly demonstrated.

In the *Bob Jones University* case which did reach the Supreme Court, an effort to enjoin denial of the tax exemption, the unanimous Supreme Court held that the *Green* opinion furnished a sufficient basis for the nondiscrimination requirement to preclude the injunctive relief which the school sought.

Subsequently the plaintiffs in the *Green* case, the original case, became dissatisfied with the IRS's enforcement of the injunction in a 1975 move of the district court to strengthen it and extend it nationwide.

In *Green* v. *Miller* the district court broadened its injunction and in *Wright* v. *Regan* the Federal Court of Appeals upheld the power of the court to expand the injunction to cover the entire country.

Two separate panels of the fourth circuit, in *Bob Jones* and *Goldsboro* cases, have held that the Service properly applied the same racial nondiscrimination requirement to religious schools. It is against the backdrop of this unanimous line of cases that the stage was set for a definitive Supreme Court decision this year, when the Court, with the encouragement of the Government, agreed to review the fourth circuit decisions.

Now, shortly after the Department of Justice had restated its support for the legal principles just discussed, the administration announced its intent to reverse the position and confer tax exempt status on the Bob Jones and the Goldsboro schools. To the astonishment of many of us familiar with the development of these cases, the administration has suggested that it is forfeiting the opportunity for Supreme Court review because it now believes there is no legal support for the Government's prior position without new legislation and that to maintain its conformity to the court orders without such congressional sanction would be to allow the Service to govern by administrative fiat. To the extent I understand this reasoning, I strongly disagree with it. Not only is there legal support for the Government's prior position, it cannot be cleanly abandoned by a simple directive to the Service to confer tax-exempt status on the Bob Jones and Goldsboro schools.

Even if the administration thereby succeeds in mooting out these cases, the Green injunction is still in force and mandates withholding exemptions from racially discriminated schools in Mississippi.

The Court may decide to extend the Green injunction nationwide. In this legal setting, the burden of developing curative legislation does not seem to be on those who seek to implement what the courts have already done, rather it would seem to be upon those who wish to see racially discriminating schools accorded tax exemptions.

If the Administration were to permit the Supreme Court's consideration of Bob Jones and Goldsboro to proceed normally, the Government is hardly bereft of grounds of urging affirmance of the fourth circuit.

While it is not my place to predict how the Supreme Court might resolve these cases, commonsense might suggest that recourse to prior legislation by those favoring the policy, should await the Supreme Court's action and not precede it.

Since the rights of these and other schools are adequately protected as the litigation proceeds, the Treasury and Justice Departments should be permitted to litigate the *Bob Jones* and *Goldsboro* cases in the Supreme Court to climax. The pending litigation, like most disputes, may be expensive and time consuming, but this is unavoidable given the difficulty and sensitivity of the important competing issues involved. As the Supreme Court noted in the first *Bob Jones* case these are issues not conducive to instant solution.

Still, with all deference to Congress, the necessarily controversial legislative alternative proposed by the administration offers no economies or short cuts. Congress' prior action on this issue suggests it is better left to the courts. Riders to the Treasury Department's appropriations bills since 1979 have frozen administration of the law as of August 22, 1978, and worse, the latest rider threatens to provoke a confrontation between the Service and courts by forbidding the Commissioner of funds to comply with lawful judicial process.

Paralysis of the Service's ability to administer the law has obstructed rather than fostered a careful sensitive solution to these difficult problems. The current riders should be allowed to expire. Instead of enacting new legislative restrictions, Congress should leave to the Service affected taxpayers and the Federal courts, the reasoned to systematic interpretation and application of existing statutes.

Thank you.

[The prepared statement follows:]

STATEMENT OF
M. CARR FERGUSON

Mr. Chairman, I am grateful to the Committee for holding today's hearing on the taxability of racially segregated private schools and for your invitation to me to offer comments. From May 1977 until January 1981 I served as the Assistant Attorney General in charge of the Tax Division of the Department of Justice. I am now in private practice and express only my personal views.

The federal tax laws now on the books have been interpreted by every federal appellate court to consider the issue as prohibiting federal tax exemption benefits for schools with racially discriminatory policies. Accordingly, new legislation is not needed to sustain the Government's consistent position of the last decade that such private schools do not qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. It is the law already.

The Government's position did not stem from IRS administrative fiat. In January 1970, a three-judge district court in the District of Columbia, in Green v. Kennedy, 309

F. Supp. 1127, enjoined the IRS from issuing exemption rulings to racially discriminatory schools in Mississippi, relying on several formidible judicial precedents. On the basis of these authorities, the legal staffs of the Justice and Treasury Departments advised President Nixon that allowing tax-exemption benefits to racially discriminatory schools was almost certainly illegal, and very likely unconstitutional. Acting on this advice, the President, in July 1970, ordered the IRS to cease issuing favorable rulings to racially discriminatory schools across the country.

The Green court, however, did not then dismiss the case as moot or withhold action in reliance on the IRS's earnest public undertaking to vigorously enforce the nondiscrimination policy on its own. Instead, the court issued a permanent injunction, detailing the terms of IRS's enforcement of the nondiscrimination policy in Mississippi. The court also declared that the tax laws mandated such a policy nationwide. Green v. Connally, 330 F. Supp. 1150. Segregated white private schools which had intervened in the case immediately challenged the constitutionality of the Green opinion and order on a direct appeal to the Supreme Court. Their arguments were rejected, as well as the contention of IRS that the courts had no jurisdiction in the case, and the Supreme Court affirmed the lower court's injunction in 1971. Coit v. Green, 404 U.S. 997.

Within the next several years, the soundness of the Green opinion was accepted by federal courts across the country.* In Bob Jones University v. Simon, 416 U.S. 725 (1974), a unanimous Supreme Court held that the Green opinion furnished a sufficient basis for the nondiscrimination requirement to preclude injunctive relief to the school.

The plaintiffs in Green became dissatisfied with IRS's enforcement of the nondiscrimination rule. In 1975, they moved the District Court to strengthen the Green injunction, and to extend it nationwide. In Green v. Miller, 45 A.F.T.R. 2d 1566 (D.C.D.C., 1979), the District Court broadened its injunction, and in Wright v. Regan, the federal Court of Appeals upheld the power of the court to expand the injunction to cover the entire country. Moreover, two separate panels of the Fourth Circuit last year held in the Bob Jones and Goldsboro cases that IRS properly applied the same racial nondiscrimination requirement to religious schools.**

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* See, e.g., Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Falkenstein v. Department of Revenue, State of Oregon, 350 F. Supp. 887 (D. Ore. 1972) (3-judge court), appeal dismissed, 409 U.S. 1099 (1973); Prince Edward Cty. School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. 1980), cert. denied, No. 80-484 (Feb. 23, 1981). See also Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973); Crenshaw County Private School Foundation v. Connally, 474 F.2d 1185 (5th Cir. 1973).

** Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schools v. United States, 4th Cir. No. 80-1473, decided February 24, 1981 (unpublished).

Against the backdrop of this unanimous line of cases, the stage was set for a definitive Supreme Court decision this year when the Court, with the encouragement of the Government, agreed to review the Fourth Circuit decisions.

Now, shortly after the Department of Justice had restated its support for the legal principles just cited,* the Administration has announced its intent to reverse its position and to confer tax-exempt status on the Bob Jones and Goldsboro schools. To the astonishment of many of us familiar with the development of these cases, the Administration has suggested it is reluctantly forfeiting the opportunity for Supreme Court review because it now believes there is no legal support for the Government's prior position without new legislation and that to maintain its conformity to the court orders without such Congressional sanction would be to allow the IRS to govern by administrative fiat.

To the extent I understand this reasoning, I strongly disagree with it. Not only is there ample legal support for the Government's prior position, it cannot be cleanly abandoned by a simple directive to the IRS to confer tax-exempt status on the Bob Jones and Goldsboro schools. Even if the Administration thereby succeeds in mooting out these cases, the Green injunction is still in force, and mandates withholding exemptions from racially discriminatory schools in Mississippi. The courts in Wright, applying equal protection principles, may decide to extend the Green injunction nationwide. In this legal setting, the burden of developing curative legislation does not seem to be on those who seek to implement what the courts have already done. Rather, it would seem that those who wish to see racially discriminatory schools accorded tax-exempt status should have the task of persuading Congress to act.*

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* See the Government's petition for certiorari in Regan v. Wright and acquiescence in the petitions in Bob Jones and Goldsboro.

If the Administration were to permit the Supreme Court's consideration of Bob Jones and Goldsboro to proceed normally, the Government is hardly bereft of grounds for urging affirmance of the Fourth Circuit. While it is not my place to predict how the Court might resolve these cases, common sense would suggest that recourse to legislation by those favoring the prior Government policy should await this decision, not precede it. Since the rights of these and other schools are adequately protected as the litigation proceeds,* the Treasury and Justice Departments should be permitted to litigate the Bob Jones and Goldsboro cases in the Supreme Court to conclusion. The pending litigation, like most disputes, may be expensive and time-consuming. This is unavoidable, given the difficulty and sensitivity of the important competing issues involved. As the Supreme Court noted in the first Bob Jones case, they are issues not conducive to instant solution.

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* Legislation affirmatively extending tax-exemption benefits to private segregationist schools would provoke, of course, constitutional objections even if restricted to religious schools. There is a necessary tension and delicate balance between the exercise of religion guaranteed by the First Amendment, and the racial nondiscrimination principles mandated by the Equal Protection Clause. The Congress might well conclude that the courts, dealing with the familiar charitable trust and constitutional guidelines underlying the law of the last 11 years, are more sensitive and flexible instruments to strike this balance, case by case, than any legislative body could be.

Still, with all deference to Congress, the necessarily controversial legislative alternative proposed by the Administration offers no economies or short cuts. Congress' prior action on this issue suggests it is better left to the courts. Riders to the Treasury Department's appropriations bills since 1979 have frozen administration of the law as of August 22, 1978. Worse, the latest rider threatens to provoke a confrontation between the IRS and the courts by forbidding the Commissioner funds to comply with lawful judicial process.* Paralysis of the Service's ability to administer the law has obstructed rather than fostered a careful, sensitive solution to this difficult problem. The current riders should be allowed to expire. Instead of enacting new legislative restrictions, Congress should leave to the IRS, affected taxpayers and the federal courts the reasoned, systematic interpretation and application of existing statutes.

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* The District Court in Green has allowed the allegedly discriminatory schools to intervene. Indeed, a few Mississippi private schools have also brought declaratory judgment suits in the Tax Court challenging revocation of their exemption rulings. Other religious schools whose exemption rulings are revoked can follow the same course; Section 7428 of the Internal Revenue Code permits donors to deduct up to $1,000 in contributions during the litigation process.

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* The so-called Ashbrook and Dornan amendments to the 1980 and 1981 Treasury Appropriation Acts have been broadened for fiscal 1982 by insertion of the underscored words in the following language in the 1982 Treasury Appropriations Bill:

> "None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, _court order_ or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978." [Emphasis provided.] H.R. 4121, 97th Cong., 1st Sess. (1981), Section 616.

So far, at least, the Government has interpreted these restrictions as not impairing the Commissioner's right to use pre-1978 administrative pronouncements as a basis for continued litigation of the cases now in court. See petition of the United States to the Supreme Court for certiorari in _Regan_ v. _Wright_, fn. 12.

Chairman **Rostenkowski**. Thank you, gentlemen.

Commissioner Thrower, you were required, were you not, to carry out the direction of the Court while you were Commissioner?

Mr. **Thrower**. Yes.

Chairman **Rostenkowski**. If that was the case then, could we not now interpret the fact that the administration's new policy is in contempt of that Court?

Mr. **Thrower**. I don't understand.

Chairman **Rostenkowski**. Could we not now conclude that the new policy is now in contempt of that Court?

Mr. **Thrower**. I would prefer not to pass judgment on that. That has been commented upon, yes. There were temporary and then permanent injunctions relating to the private schools in Mississippi.

Chairman **Rostenkowski**. I am sure that you gentlemen have read the administration's testimony submitted to the Senate Finance Committee. Would you like to comment on the legal theories that the administration is forwarding in support of the position that the law is now unclear in this area?

Mr. **Kurtz**. I suppose the best I could do in describing the administration's testimony is to say it is disingenuous. I find no even mildly persuasive, let alone compelling reason, supporting the conclusion. It reads like a brief written by a lawyer given an impossible case to defend.

There is no law to support the Government's position. There is law the other way. It is not an open question. The question has been resolved by every single court that has considered it, including the U.S. Supreme Court.

I do not understand how one even attempts to write a brief supporting the Government's position.

Mr. **Ferguson**. My reading of the statements of the Deputy Attorney General before the Senate Finance Committee leaves me puzzled. He gives me the impression of an administration which reached a courageous, unpopular decision to uphold the constitutional prerogatives of Congress to legislate over the intrusions of overreaching executive and judiciary branches of government.

He suggests at the same time that he felt compelled to this conclusion because the law was so clear. As he put it, the conclusion was "inescapable" and the statutory law language so clear and unambiguous that he had to revoke the Government's prior 10-year litigating and administrative position. Yet, he concedes that divergent views within the Service were shared by the Tax Division and the Solicitor General within the Department, and he points out that at least four Justices on the Supreme Court must have thought the issue was sufficiently in doubt to make a Supreme Court review desirable.

The severely disjunctive interpretation of the word, "or," which he places on the language in section 501(c)(3) is peculiarly divergent from judicial interpretation and seems to disregard Judge Leventhal's very scholarly rejection of this rather naive argument in the first *Green* case.

Mr. **Thrower**. With all due respect to the lawyers involved in the development of the opinions, I think they did show a failure to grasp the full significance of the problem. Their effort to find the limits on application of the law in the few simple, broad terms set out in the statute, I am afraid, lead them into unfortunate error and. thus, I feel that it is legally unsupportable and unfortunate.

Chairman **Rostenkowski**. Mr. Gibbons.

Mr. **Gibbons**. I agree with the position you have taken which I understand to be one that no further action is required by Congress at this time with the possible exception of the expiration of those appropriation riders that the administration made a mistake, what happens next? What can the court do? You have a party to the case in which everyone has lost faith in. You have an Attorney General, a Solicitor General, and a President who stated that the law is not what the law is. And they are prepared to try to convince the court of that. On the other side you have a litigant who agrees with the President, the Attorney General, and the Solicitor General. What do we do now? What courses of action are available to the court and what to other litigants?

Mr. **Kurtz**. If I may comment. It is more than that everyone now involved in the case agrees. Even that would be satisfactory for everyone to go before the court and argue the same way. The court can still make its independent judgment without the benefit of litigants who are arguing the position. What the administration has done, although it has not accomplished it, is to take the case away from the court, which is even worse.

Let the court hear the case. Let the administration argue any position it wants. I am satisfied that the court will, on its own, or with the aid of amicus briefs that have been filed, reach a sound result even if the plaintiff and the defendant in the case agree. But to take the case away, it seems to me, is totally unsupportable.

Mr. **Gibbons**. I have forgotten most of what I ever knew about appellate law, and that wasn't very much. What can the court do now?

Mr. **Ferguson**. Mr. Gibbons, the Supreme Court may not agree with the Government's suggestion of mootness. That suggestion was made, as you are aware, immediately after the January 8 announcement by the President that the Government would revoke all of the administrative pronouncements on point during the last 10 years, apparently even those compelled by court order, and would proceed to grant tax-exempt status to the Bob Jones and Goldsboro schools. Ten days later, the second administration modified the announcement that was the basis of the suggestion of mootness when it announced it was seeking legislation and would withhold processing applications for exemption from "badge of doubt" schools except for the two schools who lost their case in the fourth circuit. The Court may not find the current administration policy is as clear as it was reported to be in the earlier suggestion of mootness. Can the current administration policy really be to grant tax-exempt status only to racially discriminatory schools which have lost their cases in the fourth circuit?

Mr. **Thrower**. May I comment, Mr. Chairman? Bob Jones and the Goldsboro schools no longer have a complaint. As the record stands as of today, they are getting their money back and they are to be recognized as tax exempt. They are the appellant.

Perhaps the court, through most unusual proceedings, could keep the case, nevertheless, but it does seem to me that a much more orderly way out of this quagmire is for the administration to acknowledge the error that has been made by the lawyers—it is not without precedent that lawyers do acknowledge error, to reinstate the issue by withdrawing the decision to grant the exemption and make the refunds—to reinstate that issue before the court.

Otherwise, there is a danger that, as I indicated, we may go another 10 years before the Goldsboro Christian Schools or Bob Jones University, or others having like issues, get those questions squarely before the Supreme Court again.

It is an imposition on not only the parents and children, but on the courts, on the administration, and on the public to maintain the uncertainty that would otherwise exist for that period of time until the Supreme Court can direct itself to these religious questions.

Mr. GIBBONS. I realize my time has expired but I want to make one observation. It looks to me like what this all adds up to this morning is that the Government and the opposing parties of this case have conspired to deprive the courts of any issue that when ruled upon, is going to have—anyone is going to have much confidence in it unless the court rules against the position that the two parties have now taken, one, that position of Bob Jones University and of Goldsboro and the position of the current Government.

That is what worries me. And I hope that you will address that later on.

My time has expired.

Chairman ROSTENKOWSKI. Mr. Martin will inquire.

Mr. MARTIN. Thank you very much, Mr. Chairman.

In your remarks, Mr. Thrower, you referred to a study you had undertaken of distinctions regarding charitability. You said you did not undertake to explore religious distinctions, leaving that to others.

Has that now been explored? Is there a basis for differentiating among religious distinctions for purposes of tax exemption?

Mr. THROWER. What I indicated in a few brief comments is that we did make the general decision that the mere fact that a private school had an affiliation with a religious institution would not in itself give it exemption.

Mr. MARTIN. On that point, would you apply that also to a seminary, a private school which is a seminary?

Mr. THROWER. A religious seminary?

Mr. MARTIN. Yes. A private school.

Mr. THROWER. I want to say that the extension of this beyond the proposition which I indicated would begin to raise serious conflicts of values under the first amendment and the fifth amendment——

Mr. MARTIN. And the second?

Mr. THROWER. That would need to be resolved. Some of those are before the court at the present time.

Mr. MARTIN. Let me ask you it this way——

Mr. DOWNEY. Will the gentleman yield?

What does the second amendment have to do with it?

Mr. MARTIN. I meant the first.

Has the issue been taken by the Court as to where the issue of prejudice takes precedence over the issue of religious freedom?

Mr. THROWER. I understood that comes up in Bob Jones University which assertedly does not have a racially discriminatory admission policy but it does have, as a part of policy and practice, which it asserts is based upon fundamental religious beliefs, rules of conduct governing the students, their dating practices on and off the campus.

Mr. MARTIN. As Mr. Matsui pointed out earlier, they require students to subscribe to that belief.

Mr. THROWER. I am sure they do, yes.

Mr. MARTIN. That is the issue before the courts. It is not so clear in law as to where there is a basis for a revenue ruling to deny objections.

Mr. THROWER. That is a much broader issue than the issues we started out with.

Mr. MARTIN. The courts would have to determine, the Supreme Court would have to determine whether it was the present administration in error for seeking to preserve the principle of religious freedom, vague as it may be in the minds of many, as against racial discrimination or determine that an earlier administration was in error for taking an initiative in the opposite direction?

Mr. THROWER. I think that some uncertainty will unavoidably remain with respect to that issue until it is decided by the Supreme Court.

Mr. MARTIN. You are saying that is a question of policy that ought to be determined by the Supreme Court and not by the Congress of the United States?

Mr. THROWER. If it were determined by the Congress of the United States, it would nevertheless eventually have to be determined by the U.S. Supreme Court as to whether that did violate the first amendment rights.

Mr. MARTIN. But *Green* did not determine whether the principle of religious freedom is to be set aside.

Mr. THROWER. *Green* did not deal with the issue of religious freedom.

Mr. MARTIN. Thank you very much, Mr. Chairman.

Mr. RANGEL. If you understood the law today as you testified and were still the Commissioner, and someone gave you a political document and told you that you had to ignore the courts and the Congress and enforce that law because they appointed you, what would you do?

Mr. THROWER. Mr. Congressman, I have high regard for the present Commissioner. He is a very able and dedicated person. And any administrator has a difficult question deciding what are those things within his own personal prerogative to decide and what are those things which are subject to decision by a higher authority and that would be another question we could debate for a day or a week and I would prefer not to undertake, more or less off of the wall, to decide what I would do.

Mr. RANGEL. Do you think by taking that position that you might be placing your position in confrontation with the courts?

Mr. THROWER. I have not really thought the question through, Mr. Rangel.

Mr. RANGEL. Mr. Kurtz?

Mr. KURTZ. I was afraid you were going to ask me.

Mr. **Rangel**. It is easy for you, you are not under oath.

Mr. **Kurtz**. It is a very, very hard question and I would not venture what my decision would be. I suppose the best I could say is I would have a lot of sleepless nights about it.

How I would come out at the end is hard to say. Whether it is a direct violation of the court is a question that would require careful analysis of where the court is, what stage the proceedings are at.

I gather that the proceedings in the *Green* case have been temporarily held, waiting for the other cases to be decided. I don't know what the status of that order is at the moment.

Mr. **Rangel**. At the very least both of you would at least try to persuade those writing these opinions that they were wrong.

Mr. **Kurtz**. Certainly.

Chairman **Rostenkowski**. Mr. Stark will inquire.

Mr. **Stark**. Mr. Kurtz, when you were in Government service, this issue came up; did it not?

Mr. **Kurtz**. Yes.

Mr. **Stark**. Were you subjected to any political pressure to do otherwise, to grant exemption to the Bob Jones University or a similar kind of case?

Mr. **Kurtz**. No; none whatsoever. The Bob Jones case itself was not a case, even, that came to my immediate attention. The case that raised the issue while I was serving was *Green*—the reopening of the *Green* case where the original plaintiffs came forward and in 1976 had filed papers with the court in *Green* saying that under *Green's* jurisdiction to supervise the outstanding injunction, the injunction wasn't working.

They listed schools which had been declared in other judicial proceedings to be operating on a racially discriminatory basis but nevertheless held exemptions.

That suit was pending when I came in. That is what got us——

Mr. **Stark**. You didn't get letters from Members of Congress?

Mr. **Kurtz**. We had letters from Congress commenting on the proposed revenue procedure. I did not consider that political pressure.

Mr. **Stark**. Mr. Thrower, did that happen during your service?

Mr. **Thrower**. Mr. Kurtz had a more charmed period of service than I did. I was frequently subjected to pressures, if one would want to call it that, from Members of the Congress, from people throughout the administration with respect to decisions that we were required to make or questions that we were required to act upon within the field of charity.

While they might be called pressures, they might also be termed expressions of opinions which we took into account. When they were repeated, they could become pressures.

Mr. **Stark**. Did you ever ask a staff member to prepare a legal brief that would support or deny one of those political requests?

Mr. **Thrower**. No; the only problem I had was—it was not a great problem, of utilizing my lawyers and not trying to be my own lawyer.

Mr. **Stark**. Thank you.

Chairman **Rostenkowski**. Mr. Jacobs will inquire.

Mr. **Jacobs**. Would it be unfair to say that there is at least some evidence that this administration is trying to throw this case to the Supreme Court?

Mr. **Thrower**. That is a personal judgment. It certainly was undertaking to withdraw the issue from the Supreme Court and decide it administratively. I don't think it could be thought of as throwing the case which indicates a little deceitfulness.

It was certainly open and very direct and very blunt in seeking to moot the case.

Mr. **Jacobs**. So you think that description would be a little too blunt?

Mr. **Thrower**. It is certainly blunt.

Mr. **Jacobs**. Yes.

I have one question of the panel.

Do you consider yourselves a bipartisan panel?

Mr. **Ferguson**. I am the only one who has no political affiliation at all, here, I guess. I have never registered with either party.

I think one of my colleagues is a Republican and the other is a Democrat, but I never asked either one.

Mr. **Thrower**. I would consider this to be a bipartisan panel and I think each of us has undertaken to approach it in a nonpartisan way.

Mr. **Jacobs**. In other words, there really isn't a Republican or a Democratic way to follow the law?

Mr. **Ferguson**. That is correct.

Mr. **Jacobs**. Thank you.

Chairman **Rostenkowski**. Mr. Shannon will inquire.

Mr. **Shannon**. Thank you, Mr. Chairman.

Mr. Thrower, the testimony before the committee earlier this week, Deputy Attorney General Schmults talked about the decision that was made when you were the Internal Revenue Commissioner in 1970. He described by saying, "When confronted with the identical politically explosive issue in 1970, the Nixon administration succumbed to pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified."

What do you think of that description of your activities?

Mr. **Thrower**. I think it is inaccurate. It was not looked upon as being a politically popular decision. It was not pressed upon us as a political decision. It was an acquiescence and eventual approval of a decision made by the administrators, including myself, to do what we thought the law compelled us to do——

Mr. **Shannon**. Compelled you to do?

Mr. **Thrower**. Compelled us to do, rather than to abandon what we considered to be our responsibility and as I indicated, throw the administration of the private schools into the Federal courts perhaps for a decade or so.

Mr. **Shannon**. Would you describe the law on that point as being stronger or weaker today? In the light of the court decision?

Mr. **Thrower**. I think it is evident that the correctness and the legal validity of the decision has been strongly validated by court decisions and by actions of the Congress.

Mr. **Shannon**. Are you any less clear today than you were in 1970 that what you were doing was the right thing to do under the law?

Mr. **Thrower**. No.

Mr. **Shannon**. Do you feel more strongly that way because of the court decision?

Mr. **Thrower**. I had no question in my mind at that time, in my own mind, as to what was the—as to the legal correctness of what we were doing.

Mr. **Shannon**. Do you remember in 1970 having any discussions with anybody in the White House about the politics of the decision?

Mr. **Thrower**. I had many discussions with people in the White House who showed a great deal of interest in this. Among them, as he has indicated at hearings of the Senate Finance Committee, was now Senator Moynihan. There were others, variously interested in helping us reach the right decision.

Mr. **Shannon**. Did anybody ever come in to you and say, listen, politically we have to do this no matter what the law is?

Mr. **Thrower**. I don't recall any decision of that sort, no.

Mr. **Shannon**. Do you remember any discussions with Mr. Fielding when he was at the White House at that time?

Mr. **Thrower**. Not on that subject. I will have to confess that this was discussed with so many people in so many areas of government and was of such widespread interest I could not enumerate them all but Len Garment of the Legal Counsel's staff was the individual, as I recall, with whom I had most—more discussions than with any other, and who was undertaking more than any other to represent the views of the President to me.

Mr. **Shannon**. After that statement which I read to you earlier, Mr. Schmults went on to say, "This administration has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to the principle over political expediency. As a consequence, decisions have been made, policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounds he had on high principle.

"This is but another example of the administration's commitment to that approach."

Their characterization of what they did was they reinstated principle for your political expediency of 1970. Do they have any justification at all as far as you are concerned for saying that?

Mr. **Thrower**. I thought I did undertake to outline that people of good faith and lawyers of ability could have differed as to the legal justification for the action we took at that time, though I think they would have been wrong and were wrong and that did not represent the consensus of those who had studied it deeply, nor the opinion given to me by the lawyers in the Department of Justice.

I do think that it has been encrusted with court opinion and congressional opinion since that time. I don't question the good faith of these lawyers, I think they just did not get into the subject deeply enough and broadly enough before making recommendations representing the foundation for these decisions that have now been made.

Mr. SHANNON. Is it fair to say it wasn't as close a call in 1982 as it was with you in 1970 in light of the court cases?

Mr. THROWER. I think that is obvious, yes.

Mr. SHANNON. Let me ask one very brief question. Any time you worked in administration with your position in the Justice Department, were you ever asked to find a way to withdraw the case from Supreme Court consideration? After it had been granted?

Mr. FERGUSON. There were times when there was disagreement between various parts of the Department of Justice or between the Department and agencies as to whether court review should be sought or opposed or as to what position to take. Those disagreements were always resolved on the merits by the IRS, the Tax Division, and the Solicitor General.

I do not remember an occasion when I served, when disagreement arose as to whether to maintain a position before the court already taken. Still, it would seem to me that that would be entirely possible and I don't think any of us here this morning are questioning the propriety of the Department modifying a position in a particular case which it feels was mistaken, or, indeed, withdrawing from a particular case which it feels represents an inappropriate litigating vehicle.

Our concern this morning, however, has been not only with respect to the merits of the decision but the manner in which it was made.

[Mr. Ferguson subsequently supplied the following:]

The offices within the executive branch charged with making tax litigation policy seem to have been ignored or overruled by higher officials without experience in the field. If this is ever to be done, it should only occur when those in charge of tax litigation have failed in their responsibilities. This morning's testimony and the documentary record compiled by this committee, I think, demonstrate that the Tax Division, the IRS, and the Solicitor General's Office, which all concurred that the Fouth Circuit decisions should be defended in the Supreme Court, acted not only responsibly but consistently with legal precedent. The intervention and overruling of this position by the Attorney General or his Deputy, while within their prerogative, is extraordinary and, in the circumstances, quite unwarranted.

Mr. SHANNON. Thank you, Mr. Chairman.

Mr. GIBBONS. Mr. Matsui?

Mr. MATSUI. Thank you, Mr. Chairman.

I would like to ask Commissioner Thrower and Commissioner Kurtz a question.

The administration, as you know, has decided to allow the exemption status for Goldsboro and Bob Jones University. They will withhold, however the application for exemption for any other institution of education until the Congress takes a final definitive stance on the issue.

I know that when both of you were Commissioners of the Internal Revenue Service, one of the areas of concern must have been equal treatment of all taxpayers under the law.

How would you characterize the current situation where the administration has only singled out two schools for such preferred treatment? That is, Goldsboro and Bob Jones will receive tax-exempt status while others school in a similar position will have to wait for congressional approval?

Mr. Thrower, would you first respond and then perhaps Mr. Kurtz?

Mr. **Thrower**. I think it is a peculiar situation in that the action on pending applications would contemplate that any legislation would be retroactive back to the 1970 date.

Of course, Congress does, from time to time, provide for changes in the Internal Revenue Code that may be dated back sometimes for several years.

Generally, those are provisions that are favorable to a taxpayer, in order to do justice. It would be less usual to undertake to date back or make retroactive legislation which takes away from a taxpayer a privilege previously granted.

All I can say is that it is thought of as—in view of the situation—that the Congress, the courts, the administration, are now in a confused procedural tangle.

Mr. **Kurtz**. It is obviously a very uncomfortable situation for the administrator to be in but I agree with Mr. Thrower that it is part of the whole situation which seems to me completely unprecedented. You have an administration which comes forward and says notwithstanding a statute that the courts have uniformly interpreted to mean one thing, we really want the law to be is X but in fact it has been Y. So in the meantime until we get it where it already is, don't issue any rulings. It is just an unreal world and I don't think that you will find any precedent for that kind of a situation.

Mr. **Matsui**. When I was going to law school, I was taught to use such discretion on a most limited basis to avoid favoritism. It appears to me the administration is indeed singling out two schools for favoritism.

Mr. **Ferguson**. One of the peculiar aspects of the decision is that it seems to have been made wholly outside the normal channels for developing tax litigating policy. The central role played in the process by the Chief Counsel of the Internal Revenue Service, and the Tax Division, Department of Justice, the people who are the Government's tax experts and who are charged with responsibility for developing tax policy, seem from the Deputy Attorney General's statements to have been overruled, not because there was some nontax supervening policy or consideration, but because they were viewed to have misread a tax statute. If that is the case, this must be quite an extraordinary if not unique situation.

[Mr. Ferguson subsequently added the following:]

It threatens, of course, to erode the Attorney General's long-standing delegations of authority to the Tax Division in this area.

Mr. **Thrower**. Mr. Congressman, if I may add, I think in fairness it is not without precedent, and on this very subject matter, that the Service would suspend rulings while it undertakes to reach a decision. That was done from some time in 1965 to a time in 1967. This was on a formal and I think a publicized basis. It was done informally, in my administration, as I recall, for a period of some months while we were studying this issue, so that aspect of it is not without precedent.

Mr. **Kurtz**. Let me just add to that. While Mr. Thrower's statement is certainly true, and it comes up in lots of areas, what is unique in this situation is what you point out, that the suspension occurs at the same time that the announcement is made of granting tax exemption to two of the schools situated in the very same position.

Mr. MATSUI. In fact, with respect to the two schools, if the administration had said that they wouldn't grant the exemptions to them, the Court would not then have any problem of mootness and they could still hear the case. In essence, the administration by announcing the exemption, has removed the issue from the Court and that is the dilemma that I think we face today. We may have to wait another 10 years, as Mr. Thrower characterizes the situation, before we get final resolution of this constitutional question.

Mr. KURTZ. There is one other point which perhaps hasn't been fully explored, and that is the question of whether, in fact, it can ever get decided, because of the very difficult standing issues. That is, if the administration does in fact proceed to grant tax exemptions to segregated schools, there is a real question under existing law as to whether anyone can challenge that. The law is simply not clear.

Mr. MATSUI. Thank you.

Mr. GIBBONS. Mr. Anthony?

Mr. ANTHONY. Thank you, Mr. Chairman. I would like to pick up where Mr. Matsui left off, and even go back a step further and see if I can't summarize it and see if I have got it right in my mind as to where the confusion really is.

June of 1971, as I understand it, in *Green* v. *Connally,* a Mississippi case, the Court upon petitioners' claim and proof and arguments being made issued a State injunction and also a nationwide declaratory judgment. Is that correct? And that injunction in that declaratory judgment is in existence today?

Mr. THROWER. I would not characterize it as a nationwide declaratory injunction. The proceedings in *Green* related only to private schools in Mississippi, although the principles could be applied nationwide.

The general principles were there to be taken into consideration, of course, throughout the country.

Mr. ANTHONY. Just for your purposes then, let's just back it down to a statewide injunction. So when the administration made—pardon me?

Mr. THROWER. A temporary injunction during consideration of the case, as I recall, yes.

Mr. ANTHONY. Has that injunction been lifted?

Mr. KURTZ. No.

Mr. THROWER. And made a permanent injunction.

Mr. ANTHONY. It has been made permanent?

Mr. THROWER. Since that time.

Mr. ANTHONY. By a reapplication to the Court, and upon additional proof, so as I understand it right now, under *Green* v. *Regan's* entire judicial history, there is a permanent injunction against discriminatory religious private schools receiving a tax exempt or just private schools?

Mr. KURTZ. It was not a religious school.

Mr. ANTHONY. So that when the administration issued its ruling, it issued that ruling only for 49 States and exempts Mississippi because Mississippi was under a permanent injunction; is that not correct?

Mr. **Kurtz**. Well, it didn't explicitly say that.

Mr. **Anthony**. But that was the——

Mr. **Kurtz**. Yes, that injunction is still outstanding.

Mr. **Anthony**. That is the practical effect of what happened, is that not correct?

Mr. **Kurtz**. Yes.

Mr. **Anthony**. So then to even compound the matter worse, as Mr. Matsui has brought out, on January 8 there was a directive to the IRS to specifically grant the exemption to Bob Jones University and to Goldsboro Christian Schools. But then on January 18th of 1982, the same day that the President made the proposal for legislation, the IRS was further directed not to grant tax exemptions to any private school, but Bob Jones and Goldsboro. Have I stated the record correctly so far?

Mr. **Ferguson**. Yes, sir. There might be one little point of difference. The *Bob Jones* and *Goldsboro* cases were not injunctive proceedings. They were proceedings involving dollar amounts which had been assessed by the Service on the grounds that they were not tax exempt, so there aren't any injunctive orders outstanding against the Service in these cases.

Mr. **Anthony**. I understand. As a matter of fact, those particular cases are still pending for monetary judgments for the U.S. Government against both of those universities for failure to pay back taxes.

Mr. **Ferguson**. Yes, sir.

Mr. **Anthony**. Those cases may or may not be dismissed, but under what has happened I think we can carry that to the logical conclusion, they will probably petition to have those dismissed as moot, too, saying that there are no damages if they didn't agree with the position upon which they were trying to claim the damages to begin with.

So if I understand it then, we have really got three situations as far as tax exempt status for these institutions is concerned. We have got Mississippi sitting out there by itself. We have got Bob Jones University and Goldsboro Christian Schools sitting out there by themselves, and then we have all of these other multitude of schools and institutions of various descriptions that have made application that have been denied by administrative fiat.

Have I summarized it correctly so far? My question simply is this. If part of the original policy was to criticise the IRS for determining national policy without going through Congress or without going through the Constitution, have they not done the identical thing for those schools that are put in the deep freeze, as Professor Tribe described, can't those hundred schools say this administration is guilty of the same thing? That they wanted to change the law? And that they accused the people in 1971 of being guilty of originally?

Mr. **Thrower**. Perhaps I can add to that. It is difficult for me to get rationality out of this present state of confusion.

Mr. **Anthony**. Could those 100 schools not make a very substantial argument that they are placed in the same position that Bob Jones University and Goldsboro Christian Schools were in immediately prior to the January 8 declaration and then the January 18? That is part of the total confusion that we need to resolve.

Mr. THROWER. They can certainly point out that Bob Jones and the Goldsboro Schools have their exemptions, have their money back, and yet they themselves, if they are similarly situated, do not have their exemptions.

Mr. ANTHONY. Mr. Chairman, since I passed up questioning on the first panel, if you would permit I would just like to read one statement to see if they agree or disagree. This is referring to the *Bob Jones University* case.

The case was commenced during a Republican administration in 1970, and carried through a successful appeal to the Fourth Circuit Court of Appeals. This suggests that the Service's position is neither frivolous nor the application of the social policies of the IRS bureaucracy.

If the administration were now to take the position that the case should not be pursued before the Supreme Court, that view would be read as a statement by the administration that overtly discriminatory practices are not objectionable, and is a significant retreat from the past policies in this area of both Republican and Democratic administrations.

I would just like each one of you to comment as to whether you agree or disagree with that statement?

Mr. THROWER. Let me suggest a modification of the facts. The Bob Jones University controversy did not begin in 1970. In 1970 Bob Jones had a policy of nonadmittance with respect to blacks. It changed that policy at a later time to a policy that I have described earlier. I think that change was in 1974, and the controversy and the litigation arose out of that particular state of facts, rather than what was faced in 1970, and I will let my colleagues comment on the merits.

Mr. ANTHONY. With that clarification of the statement, do you generally agree or disagree with that statement that I read?

Mr. THROWER. I would have to study the statement. I would not characterize it in our present dilemma just in those terms.

Mr. ANTHONY. I am not trying to trap you. I will be happy to tell you where I am reading from. By request of the chairman some interoffice memoranda were presented to this committee, and I am reading from a memorandum that was prepared by Peter J. Wallison, General Counsel, was submitted to the Secretary of Treasury Regan through R. T. McNamar, and on page 3 of his briefing to those individuals contains that statement.

I was I guess curious, since you gentlemen were actively involved. I hesitated to ask anybody else, because they wouldn't have the knowledge of the situation that you have. But the three of you present a wide range of background and knowledge. I was just curious how you felt about those things.

Mr. FERGUSON. I am less inhibited. I think the statement is a fair statement. I know that the Department of Justice, while I was there, did not take positions in those courts because we thought we were exercising discretionary choices about social policy, but because we felt we had an obligation to enforce the law.

Mr. KURTZ. That is the issue I would reinforce. I think that if anything that is an understatement in the sense that it leaves the impression there is a choice, a free choice of either to pursue denying tax exemption to segregated schools or to go the other way.

That choice by the time that memo was written in my view did not exist. The law is really quite clear. It is not really a retreat from a social position. The issue is one of trying to reverse well established legal principles.

Mr. ANTHONY. Thank you very much.

Thank you, Mr. Chairman, for your indulgence.

Chairman ROSTENKOWSKI. Thank you, gentlemen, for joining us this afternoon. You have been most helpful.

The Chair calls Deputy Attorney General Schmults, Mr. William Bradford Reynolds, Secretary McNamar, and Mr. Wallison. Welcome to the Ways and Means Committee, gentlemen.

Since your testimony is identical to the testimony that you gave to the Senate Finance Committee, I ask that you summarize your statements. I am sure that all the members of this committee have reviewed your testimony. I am sure that the members are more interested in asking questions, than they are having you present the entire length of your statement.

We will begin with you, Mr. Schmults. You may proceed.

STATEMENT OF EDWARD SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ACCOMPANIED BY WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

Mr. SCHMULTS. Yes, I would like to start, but I would also like to give my full statement. We spent a good deal of time on this testimony, and I think the question is extremely important. I realize it is late in the day. We would be happy to come back again, but our strong preference would be to——

Chairman ROSTENKOWSKI. Mr. Schmults, you have already testified before the Senate Finance Committee, I believe.

Mr. SCHMULTS. I know, but not before this committee. There are many other people in this room, and I think fairness requires that we be permitted to outline our full testimony, if it is all right with the chairman.

Chairman ROSTENKOWSKI. How long do you think it will take to read it, Mr. Schmults? Are you going to read the entire statement?

Mr. SCHMULTS. Yes, sir.

Mr. STARK. Mr. Chairman——

Mr. SHANNON. Is your testimony, Mr. Schmults, the same as it was before the Senate?

Mr. SCHMULTS. Essentially, yes. There are some small changes.

Mr. SHANNON. Members of the committee have had copies of that testimony. We understand that you went through it at some length before the Senate. It didn't lead to much, and I don't think your reading that lengthy statement here will lead to much. We have read your statement.

Mr. VANDER JAGT. Mr. Chairman, we have been here for 4 hours. Every witness, largely without criticism, has had a full opportunity to present their statement. It is an important issue.

Chairman ROSTENKOWSKI. There is no question in my mind.

Mr. VANDER JAGT. I think in fairness——

Chairman ROSTENKOWSKI. If the gentleman will yield, I was trying to expedite their testimony because we have already had the opportunity to read the statements which were presented to the Senate Finance Committee. These statements are identical. Mr. Schmults, if you want to read your testimony, you go right ahead and read it.

Mr. SCHMULTS. Thank you, Mr. Chairman.

Mr. MATSUI. Mr. Chairman, perhaps this has already been discussed and I haven't been privy to the debate, but I understand there was some discussion about having the witnesses, especially in view of the fact they are going to read their testimony, to be under oath. Has that been discussed? I think Mr. Rangel had——

Chairman ROSTENKOWSKI. There was a discussion about swearing in the witnesses. The Chair has indicated that this is an oversight hearing. At this time I do not feel that the Chair wants to entertain any motion to have witnesses sworn in. That would turn this oversight hearing into a formal investigation. If we were to do that, I would want to serve notice and have another hearing. At this point I do not think that I want to entertain such a motion. However, it does not necessarily mean that we cannot do that some time in the future.

Mr. RANGEL. What I was about to raise, Mr. Chairman, since I was privy to the Senate testimony and as pointed out by other members of this committee, we have read the statements, I wonder whether or not this hearing could be declared sufficient notice that if after conclusion of the hearings today this committee decides to reconvene, that the Chair would not have to put the administration on further notice, that we may be asking for sworn testimony?

Chairman ROSTENKOWSKI. I think that is notice enough.

Mr. MCNAMAR. Mr. Chairman, we are absolutely indifferent as to whether we are sworn in or not.

Chairman ROSTENKOWSKI. I understand. However, the Chair feels that if we are going to have sworn testimony, we should notify all members of the committee. As you can see, there are some members that are absent. In fairness to them, I would like to have a vote if we are going to swear in the witnesses. I would have to have a vote of the committee as well.

Mr. Schmults, you may proceed.

Mr. SCHMULTS. Mr. Chairman, I will in deference to the committee, shorten my testimony. I have just been looking at it. I will not read about a third of it. What I will basically be leaving out is the chronology on pages 8 through 14, and I will leave out what I think is a legal point that has really been raised later involving the applicability of the Civil Rights Act, an argument that I think is wholly without merit. That is at the bottom of pages 19, 20, and the top of 21. And I think that would shorten my testimony about by one third and I hope that will be agreeable to you and the committee.

Chairman ROSTENKOWSKI. Identify yourself and proceed with your testimony.

Mr. SCHMULTS. Mr. Chairman, I am the deputy attorney general of the United States. I am pleased to appear before this committee today to explain the Department of Justice's role in the decision by the administration to change its position in the *Bob Jones University* and *Goldsboro Christian Schools* cases, and to review with you the legal basis for that decision. With me on the panel is William Bradford Reynolds, the assistant attorney general for civil rights.

There is, I believe, no issue that deserves more serious attention, or requires more thoughtful reflection, than the one now being addressed by this committee. The announcement on January 8, 1982, regarding the 11-year practice of the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code has understandably evoked nationwide controversy.

It has erroneously been perceived by many as a dramatic retreat from the commitment of this administration to pursue an active and vigorous enforcement policy in the area of civil rights. And, some have characterized the decision as an open endorsement of racial discrimination.

Mr. Chairman and members of this committee, the charge that racial considerations entered the administration's decision concerning the tax-exempt status of private schools is absolutely false. The President's record, both in word and deed, speaks unmistakably and unequivocally to his abhorrence of racial discrimination.

In submitting to the President of the Senate and the Speaker of the House of Representatives the tax-exemption legislation that this committee will now consider, the President declared: "I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and our citizens hold dear, and I believe this repugnance should be plainly reflected in our laws."

These words reflect not only the President's sentiments, but those of his administration and of the overwhelming majority of the American people who deplore racial discrimination in any form. The Attorney General emphatically underscored this position just last week in a colloquy with Senator Kennedy during his appearance before the Senate subcommittee on the Constitution to support the extension of the Voting Rights Act. "I yield to no man," he stated, "in my abhorrence of racial discrimination."

I, too, Mr. Chairman, yield to no man in my intolerance of discrimination, and I know Mr. Reynolds shares that view. On this point, we are adamant and uncompromising. This administration remains dedicated to continuing the hard fought battle to eradicate racial discrimination from our Nation.

This committee has inquired as to how the Department of Justice, as part of an administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race.

The answer, Mr. Chairman, is that we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.

While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the precise legal issue was before the U.S. Supreme Court in the *Bob Jones University* and *Goldsboro* cases. Thus, at least four members of the court considered the question sufficiently unsettled to warrant Supreme Court review.

I am here today to explain the reasons for the Department's advice regarding the authority of the Internal Revenue Service, and to describe the legal deliberations that antedated that advice. While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and Federal law.

While the entire focus of media attention on this issue has been in terms of civil rights implications which certainly is understandable there is another equally fundamental consideration that seems to be largely overlooked. The *Bob Jones* and *Goldsboro* cases raise in the starkest terms an issue that goes to the very heart of our constitutional form of government.

Under article I of the Constitution, the legislative powers in this country are vested in the Congress of the United States, not in the judicial or executive branches. It is for Congress to make national public policy by enactment of laws and it is Congress responsibility to devise by laws the sanctions to be imposed on those individuals and institutions in our society who fail to adhere to those laws.

Our concern in the Department of Justice was that the fourth circuit decisions endorsed an administrative practice and procedure that was not simply lacking in congressional authority, but seemed to be directly contrary to the legislative directive in section 501(c)(3) of the Internal Revenue Code.

If that proved in fact to be the case on a comprehensive legal analysis of the statute and its legislative history, the Internal Revenue Service, not Congress, was determining on the basis of national policy how the taxing laws should be administered and enforced.

In the context of a private school practicing racial discrimination there is no one in this room who would argue with the proposition that such behavior deserves the harshest condemnation, but I also believe that there are few here who would quarrel with the proposition that it is Congress responsibility to declare by law how that condemnation is to be expressed and what sanctions are to be applied.

If that constitutional imperative is ignored in one politically sensitive area, it is difficult, indeed impossible, to see why it should not be ignored elsewhere. Let us assume that the Internal Revenue Service today may, without congressional authorization, determine on the basis of what it genuinely perceives as national policy considerations that tax-exempt status should be denied to private schools that discriminate on grounds of race. Tomorrow, the tax exemption could well be eliminated by the Service—again without any congressional action—for private schools that enroll only males or females. Presumably, hospitals that either do or do not permit abortions could be equally vulnerable to the taxing decisions of the IRS on the basis of its perception of national policy in this area at any given point in time.

That prospect—that is, leaving the tax-exempt status of private schools and institutions to the sole discretion of the Internal Revenue Service based on its independent view at the moment of national policy goals—runs counter to our most fundamental principles of democratic government.

As the President of the United States made clear throughout his campaign and his first year in office, the laws of this country are to be made by Congress, not by "administrative fiat," or by judicial activism.

It is this principle that lies at the core of the legal issue in the *Bob Jones* and *Goldsboro* cases. While it comes to the fore in a context that regrettably has overtones in the civil rights area, which inevitably ignites passionate debate, that fact should make us more, rather than less, attentive to reaching a proper legal conclusion.

As offended as we are by the racially discriminatory practices of Bob Jones University and Goldsboro—practices that we in no way condone or accept—we cannot allow our strong disagreement with such policies to dissuade us from coming to grips with the hard legal issue that is presented. There is but one thing more important to the civil rights movement in this country than combatting racial discrimination, and that is that the combat be waged within the letter and spirit of the law as determined by Congress, not outside the law or in disregard of the Federal statutes on the books.

Mr. Chairman, I cannot state emphatically enough that this decision was compelled by the Department's view of the law, specifically 501(c)(3) of the Internal Revenue Code of 1954. The pertinent language of 501(c)(3) exempts from taxation, and I quote, "corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes or for the prevention of cruelty to children or animals."

That language was interpreted by the three judge Federal district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), as requiring organizations satisfying any of the enumerated purposes also to be "charitable" in the common law sense—that is, in the sense that the organization's purposes and practices must accord with public policy—in order to qualify for tax-exempt status.

Green was summarily affirmed by the Supreme Court. *Coit* v. *Green*, 404 U.S. 997 (1971). However, summary affirmances traditionally have little precedential value, and in this instance, as the Supreme Court has itself subsequently noted, the special circumstances involved in *Green*; that is, that it basically was not an adversary proceeding and the reversal of legal position by the IRS later in the case made the summary affirmance of no binding significance.

Thus, the core question remained unresolved: Did Congress intend by enactment of section 501(c)(3) to authorize the Internal Revenue Service to withhold tax-exempt status from otherwise qualified organizations based on the organizations' adherences to practices deemed by the Service to conflict with public policy. As set forth in detail in the analysis of legal authorities submitted today for the record, an examination of congressional intent has led the Department of Justice to conclude that it did not.

The search for legislative intent begins, of course, with the words of the statute to be construed. Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive with the word "or," manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions.

This commonsense interpretation of the language of section 501(c)(3) is reinforced by the settled canon of statutory construction requiring that related provisions be interpreted in para materia. Sections 503, 504, and 513 of the Code, sister provisions of section 501(c)(3), reiterate the separate and disjunctive purposes and functions described in section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for . . . exemption under section 501(a)."

Indeed, the regulations promulgated by the Service under section 501(c)(3) expressly provide that "each of the purposes specified in [section 501(c)(3)] . . . is an exempt purpose in itself [and] an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . ."

Where statutory language is so clear and unambiguous, courts traditionally decline to examine legislative history. We did not end our inquiry with the plain meaning of the Code provision, however. Rather, we undertook a comprehensive review of the legislative history to ascertain whether it revealed support for the proposition that Congress intended to deny tax-exempt status to otherwise qualified organizations deemed by the Internal Revenue Service to violate public policy. We found none.

The provisions now contained in section 501(c)(3) originated as part of the Tariff Act of 1894, which exempted from taxation organizations "conducted solely for charitable, religious or educational purposes." There is nothing in the legislative history of this early revenue act, nor in the legislative history of the many subsequent congressional reenactments of this same basic provision, indicating that Congress intended that bona fide "educational" or "religious" organizations must also meet all characteristics of a common law charity.

To the contrary, the interpretive regulations issued by the Internal Revenue Service in connection with these revenue acts, and followed by the Service for over 50 years, uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common law sense.

Not until 1959 did the Internal Revenue Service broaden its regulatory definition of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(2).

Even then, however, that same regulation defines "educational" without any reference to the concept of charity, thus reflecting the Service's pre-1970 view that, although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under section 501(c)(3).

In sum, Mr. Chairman, we were unable on the most painstaking examination of the statute and its history to find support for the position—advanced by the IRS for the first time in 1970—that private schools pursuing racially discriminatory policies could be denied a tax exemption. Indeed, the IRS had itself long maintained that such a denial would be unauthorized agency action. It was in fact, arguing that very position in *Green* at the time of its sudden reversal in 1970 on explicit directions from the White House.

Nor could we find evidence of congressional action subsequent to 1970 that suggests ratification by both the House and Senate of the Service's practice in this area over the last 11 years. To the contrary, Congress recently expressed grave reservations concerning the authority of the IRS to deny tax-exempt status to organizations deemed to be in violation of public policy.

Sponsors in both the House and the Senate of the Ashbrook amendment to the Treasury, Postal Service and General Government Appropriations Act of 1980 maintained that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory practices.

In barring the prospective use of funds for such purposes in the Ashbrook amendment, Congress made it abundantly clear that it was leaving undisturbed the status quo with regard to denials of tax exemptions between 1970 and 1978 so as to provide a full opportunity for the legislature to consider the correctness of the Service's interpretation of section 501(c)(3). By no conceivable stretch of the imagination can this legislative activity in connection with a rider to an appropriations bill be regarded as approval or ratification of the very construction of section 501(c)(3) that was at the time being so roundly criticized.

The legal conclusion seemed to us, Mr. Chairman, to be inescapable. Congress intended—as deduced from the statute's language and legislative history, the Service's interpretive regulations, and subsequent congressional activity—that secton 501(c)(3) exempt from income taxation "educational" organizations that are not also "charitable" as surely as it exempts "charitable" organizations that are not also "educational."

The contrary construction accorded the statute by the district court in *Green* and the Fourth Circuit Court of Appeals in *Bob Jones* and *Goldsboro* does a disservice to the most basic canons of statutory construction and we cannot in good conscience support that position.

Having reached the conclusion that an argument to support the interpretation that has been given to section 501(c)(3) since 1970 should not be advanced in the Supreme Court, we felt compelled to recommend to the Treasury Department that it no longer pursue that course.

There was clear recognition at both the Department of Justice and the Department of the Treasury that such a reversal of position would likely be misunderstood and mischaracterized by many as encouragement, or at the very least tolerance, on the part of the Government of what are sometimes referred to as "segregation academies." When confronted with the identical politically explosive issue in 1970, the Nixon administration allowed the IRS to proceed down a path that was politically attractive but legally unjustified. One can certainly suggest that legislation should have been enacted in 1970 to accomplish the desired result.

This administration, Mr. Chairman, has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to principle over political expediency. As a consequence, decisions have been made, and policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounded on high principle. This is but another example of the administration's commitment to that approach.

Here, the principle involved is among the most fundamental to our system of democratic government. The first sentence of the Constitution declares:

> All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

This provision, and similar grants of power to the executive and judicial branches in articles II and III of the Constitution, reflect a scheme of checks and balances integral to freedom and ordered liberty. Under article II of the Constitution, once the meaning of a law is discerned, the executive is charged with its faithful execution.

The Internal Revenue Service's practice since 1970 of denying tax exemptions to private schools that discriminate runs directly counter to that constitutional scheme. It opens the door for administrative agencies to "legislate" by administrative fiat, and, without guidance from Congress, to make fundamental policy decisions that impact directly on every citizen in this country.

Such transgressions by the executive on congressional prerogatives are most inviting where the end being sought—that is, the removal of racial discrimination in our educational institutions—is a common objective to which all branches of Government subscribe. But, it is in precisely such circumstances that we must be sure that principle wins out over emotion, no matter how difficult the decision may be.

Mr. Chairman, the power to grant or deny exemptions from taxation is legislative in nature. Congress has not yet authorized the Internal Revenue Service to withhold exemptions from private schools on the ground that they practice racial discrimination. The President has forwarded to the Congress legislation that would grant the IRS such authority. He has asked that you give this matter the very highest priority and enact the legislation as rapidly as possible.

This administration is concerned with, and sensitive to, minority interests and civil rights concerns. In enforcing the many Federal statutes that afford protections in this as well as other areas, we must, of course, uncompromisingly discharge our responsibility to uphold the Constitution and laws of this land. That responsibility cannot be carried out faithfully, and with full integrity, if we allow administrative agencies, no matter how well intended, to act on their own in seeking to achieve even the most laudable ends.

That was the fundamental issue in the *Bob Jones* and *Goldsboro* cases, and it was for the reasons that I have stated that the Department of Justice concluded as a matter of law, notwithstanding our repugnance for the racially discriminatory practices of the two schools, that the IRS practice since 1970 could no longer be supported.

That is the end of my statement, Mr. Chairman. Of course, I would ask that the full statement be included in the record of the proceedings, and in addition, I would like to have included in the record of the proceedings this analysis of legal authorities which we have previously sent to the committee. [See p. 627.]

Chairman ROSTENKOWSKI. Without objection, it is so ordered.

[The statement of Mr. Schmults follows:]

STATEMENT OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee --

I am pleased to appear before this Comittee today to explain the Department of Justice's role in the decision by the Administration to change its position in the Bob Jones University and Goldsboro Christian Schools cases, and to review with you the legal basis for that decision. With me on the panel is William Bradford Reynolds, the Assistant Attorney General for Civil Rights.

There is, I believe, no issue that deserves more serious attention, or requires more thoughtful reflection, than the one now being addressed by this Committee. The announcement on January 8, 1982, regarding the eleven-year practice of the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code has understandably evoked nationwide controversy. It has erroneously been perceived by many as a dramatic retreat from the commitment of this Administration to pursue an active and vigorous enforcement policy in the area of civil rights. And, some have characterized the decision as an open endorsement of racial discrimination.

Mr. Chairman and members of this Committee, the charge that racial considerations entered the Administration's decision concerning the tax-exempt status of private schools is absolutely false. The President's record, both in word and deed, speaks unmistakably and unequivocally to his abhorrence of racial discrimination. In submitting to the President of the Senate and the Speaker of the House of Representatives the tax-exemption legislation that this Committee will now consider, the President declared:

"I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and our citizens hold dear, and I believe this repugnance should be plainly reflected in our laws."

These words reflect not only the President's sentiments, but those of his Administration and of the overwhelming majority of the American people who deplore racial discrimination in any form. The Attorney General emphatically underscored this position just last week in a colloquy with Senator Kennedy during his appearance before the Senate Subcommittee on the Constitution to support the extension of the Voting Rights Act. "I yield to no man," he stated, "in my abhorrence of racial discrimination."

I, too, Mr. Chairman, yield to no man in my intolerance of discrimination, and I know Mr. Reynolds shares that view. On this point, we are adamant and uncompromising. This Administration remains dedicated to continuing the hard-fought battle to eradicate racial discrimination from our Nation.

This Committee has inquired as to how the Department of Justice, as part of an Administration committed to combatting racial discrimination, could have advised the Department of Treasury that the Internal Revenue Service lacks authority to deny tax-exempt status to private nonprofit schools that discriminate on the basis of race. The answer, Mr. Chairman, is that we undertook, as is our responsibility, an objective and comprehensive analysis of the law in the area, and concluded that there is neither a constitutional nor statutory basis for the practice followed by the Internal Revenue Service since 1970.

While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the precise legal issue was before the United States Supreme Court in the Bob Jones University and Goldsboro cases. Thus, at least four members of the Court considered the question sufficiently unsettled to warrant Supreme Court review.

I am here today to explain the reasons for the Department's advice regarding the authority of the Internal Revenue Service, and to describe the legal deliberations that antedated that advice. While some undoubtedly disagree with the Department's legal position, no one can fairly attribute racial motives to our decision, nor justifiably accuse us of acting irresponsibly or in derogation of our obligation to resist racial discrimination in all forms through vigorous enforcement of the Constitution and federal law.

A recitation of the events that culminated in the Department's conclusion that the Internal Revenue Service lacks authority to employ federal public policy to deny tax-exempt status to nonprofit private schools is necessary to appreciate fully the decision that was made.

In February 1981, a panel of the Fourth Circuit Court of Appeals in Bob Jones University v. United States, ruled by a 2-1 vote that the denial of tax exemptions to private schools on public policy grounds is authorized by Section 501(c)(3) of the Internal Revenue Code of 1954. That decision was followed by a second panel decision of the Fourth Circuit, again divided 2-1, in Goldsboro Christian Schools v. United States. The court in Goldsboro "simply affirm[ed] the district court for the reasons advanced in the Bob Jones University case." Both schools filed writs of certiorari seeking review of the decisions by the United States Supreme Court.

The United States participated in both Bob Jones and Goldsboro in the Fourth Circuit, and there argued that the IRS practice was authorized by statute.

In September 1981, officials of the Department of Justice met with officials from the Internal Revenue Service to discuss the Government's response to the pending certiorari petitions. The IRS urged that the United States acquiesce in the petitions because it believed that a definitive Supreme Court ruling was both needed and desirable regarding the authority of the Service to invoke public policy as a basis for denying tax exemptions. The Department of Treasury did not participate in these discussions.

On September 19, 1981, the Department of Justice filed a Brief for the United States in the Supreme Court that urged, as IRS had requested, that the petitions be granted. That Brief, following the position that the Government had taken in the court of appeals, stated an intent to support the authority of the IRS to deny tax exemptions to Bob Jones and Goldsboro, if the cases were heard on the merits.

In October 1981, the Supreme Court granted certiorari in the Bob Jones and Goldsboro cases. Following the grants of certiorari, the Tax Division undertook to prepare a draft brief on the merits for review by the Solicitor General's office. That effort was completed sometime in late November or early December and -- as had been the case throughout these litigations in light of the unmistakable civil rights implications involved -- copies were distributed to the Civil Rights Division for review and comment.

In early December, 1981, Mr. Reynolds, and others in the Department who had reviewed the Tax Division draft, voiced concern to me over the claimed legal basis for IRS authority to deny tax exemptions to private schools under Section 501(c)(3). For Mr. Reynolds, the issue was particularly troublesome. As the chief law enforcement official of the Administration in the area of civil rights, he recognized fully the implications of a determination that the IRS had been acting without sufficient legal basis in this area since 1970. At the same time, he believed that the Administration should not take a position in the Supreme Court countenancing unauthorized administrative action, if our legal analysis convinced us that the position of the Fourth Circuit could not be sustained.

On this point I fully agreed. While the entire focus of media attention on this issue has been in terms of the civil rights implications -- which certainly is understandable -- there is another equally fundamental consideration that seems to have been largely overlooked. The Bob Jones and Goldsboro cases raise in the starkest terms an issue that goes to the very heart of our constitutional form of government. Under Article I of the Constitution, the legislative powers in this country are vested in the Congress of the United States, not in the Judicial or the Executive Branches. It is for Congress to make national public policy by the enactment of laws and it is Congress' responsibility to devise by law the sanctions to be imposed on those individuals and institutions in our society who fail to adhere to those laws.

The concern of Mr. Reynolds and others in the Department over the Fourth Circuit's decisions in these cases -- a concern, I must say, that I shared -- is that it endorsed an administrative practice and procedure that was not simply lacking in Congressional authority, but seemed to be directly contrary to the legislative directive in Section 501(c)(3) of the Internal Revenue Code. If that proved in fact to be the case on a comprehensive legal analysis of the statute and its legislative history, the Internal Revenue Service -- not Congress -- was determining, on the basis of national policy, how the taxing laws should be administered and enforced. In the context of a private school practicing racial discrimination, there is no one in this room who would argue with the proposition that such behavior deserves the harshest condemnation. But, I also believe there are few here who would quarrel with the proposition that it is Congress' responsibility to declare by law how that condemnation is to be expressed and what sanctions are to be applied.

If that Constitutional imperative is ignored in one politically sensitive area, it is difficult, indeed impossible, to see why it should not be ignored elsewhere. Let us assume that the Internal Revenue Service today may, without congressional authorization, determine on the basis of what it genuinely perceives as national policy considerations that tax-exempt status should be denied to private schools that discriminate on grounds of race. Tomorrow, the tax exemption could well be eliminated by the Service -- again without any congressional action -- for private schools that enroll only males or females. Presumably, hospitals that either do or do not permit abortions could be equally vulnerable to the taxing decision of the IRS on the basis of its perception of national policy in this area at any given point in time.

That prospect -- *i.e.*, leaving the tax-exempt status of private schools and institutions to the sole discretion of the Internal Revenue Service based on its independent view at the moment of national policy goals -- runs counter to our most fundamental principles of democratic government. As the President of the United States made clear throughout his campaign and his first year in office, the laws of this country are to be made by Congress, not by "administrative fiat," or by judicial activism.

It is this principle that lies at the core of the legal issue in the *Bob Jones* and *Goldsboro* cases. While it comes to the fore in a context that regrettably has overtones in the civil rights area, which inevitably ignites passionate debate, that fact should make us more, rather than less, attentive to reaching a proper legal conclusion. As offended as we are by the racially discriminatory practices of Bob Jones University and Goldsboro -- practices that we in no way condone or accept -- we cannot allow our strong disagreement with such policies to dissuade us from coming to grips with the hard legal issue that is presented. There is but one thing more important to the civil rights movement in this country than combatting racial discrimination, and that is that the combat be waged within the letter and spirit of the law as determined by Congress, not outside the law or in disregard of the federal statutes on the books.

In response to these concerns, I convened a meeting on December 8, 1981, with representatives of the Solicitor General's office, the Tax Division, the Civil Rights Division and other lawyers in the Department to discuss the legal position of the United States regarding the authority of the Internal Revenue Service to deny tax exemptions to private schools under Section 501(c)(3) of the Code. Following the meeting, I called the Deputy Secretary of the Treasury and suggested that Treasury might wish to review the Bob Jones and Goldsboro cases as they involved significant policy issues.

About two weeks later, a draft of a brief on the merits to be filed in the Bob Jones and Goldsboro cases, prepared by the Solicitor General's office, was delivered to the Treasury Department for its review and comments. Consultations with Treasury and IRS officials regarding the brief were held. As a result of those discussions, it was agreed that further work should be done on the draft brief to state more precisely the legislative basis for the IRS' assertion of authority to deny tax exemptions on public policy grounds when racial discrimination is involved. Our objective was to determine whether a principled argument could be made to support denial of tax exemptions to private schools engaging in racial discrimination without significant risk of inviting denials of exemptions for a variety of other reasons as exercises of unfettered administrative discretion not authorized by Congress. This effort was undertaken on a coordinated basis by the Tax Division and the Solicitor General's office.

Another draft of the brief was forwarded to the Department of the Treasury on December 29, 1981. After reviewing it, Mr. Reynolds, I and others remained unpersuaded by the legal arguments advanced. It was our opinion that such arguments were not sufficient to justify denial of tax exemptions because of race discrimination without also empowering the Internal Revenue Service to deny exemptions for a host of other social policy reasons. Deputy Secretary McNamar advised me that his independent review of the draft brief resulted in the same reservations.

At that point, I asked Assistant Attorney General Reynolds to prepare a written analysis of the relevant legal and policy considerations in support of his position. He submitted a lengthy memorandum on the morning of January 6, 1982, copies of which have been provided to the Committee, addressing the relevant legal points and concluding that the IRS practice since 1970 was unauthorized under Section 501(c)(3). Simultaneously, the Solicitor General's office completed its work on the draft brief arguing the other side of the issue. The memorandum and draft brief were furnished to Treasury.

As it became apparent that the analyses undertaken by the Department of Justice and the Department of Treasury might eventuate in the Government's change of legal position in the Bob Jones and Goldsboro cases, two meetings were held with White House Counsel to review this probable development. On December 22, 1981, Department of Treasury officials met with the White House Counsel to discuss the policy decision under consideration regarding IRS authority. On December 30, both Justice Department and Treasury officials met with the White House Counsel to relate the probable changes in legal and policy positions in Bob Jones and Goldsboro.

Because both Departments foresaw that heated public criticism and protest might accompany a change of an eleven-year litigating and policy position in the pending Supreme Court cases, reviewing them with the White House Counsel and discussing the legal and policy analyses conducted by the Justice and Treasury Departments was entirely appropriate.

On January 6, 1982, the Attorney General held a two and one-half hour meeting during which all the legal arguments for and against the claimed IRS authority were presented by those in the Department who had worked on the issue. That meeting was attended by representatives of the Solicitor General's office and Tax Division, Mr. Reynolds, Mr. Olson, Assistant Attorney General of the Office of Legal Counsel, and members of the Attorney General's staff and my staff. At that meeting, it was determined that the

Department of Justice should advise the Department of the Treasury that our legal analysis led us to conclude that the IRA practice lacked statutory authority.

Following receipt of the legal advice of the Department of Justice and the policy recommendations of his officials, the Deputy Secretary of the Treasury decided that the tax exemptions to Bob Jones University and Goldsboro schools had been wrongfully denied and should be granted.

On January 8, 1982, the Attorney General, Brad Reynolds and I met with Secretary Regan and other Treasury officials to discuss the announcement of the Treasury decision. Later the same day, the Department of Justice, in accordance with the decision, filed a Memorandum with the Supreme Court, noting the intent of the Internal Revenue Service to revoke the relevant Revenue Rulings in this area and to grant tax exemptions to Bob Jones University and to Goldsboro. The Memorandum also urged that the two cases be dismissed on the ground of mootness and that the decisions of the Fourth Circuit Court of Appeals be vacated.

On January 12, 1982, the White House announced that it would seek the legislation necessary to empower the Internal Revenue Service to deny tax exemptions to schools that discriminate on account of race, and, on January 18, 1982, proposed legislation was submitted to the Congress by the President.

Pursuant to a request by the Treasury Department, on January 29, 1982, we forwarded to Treasury an analysis of legal authorities which I now ask be included in the record of this hearing. This analysis restates the written and oral advice the Justice Department gave to the Treasury late in December and the first week of January. We also address in the analysis certain collateral legal questions which arose in the aftermath of the January 8 decision.

During the course of the Department's deliberations on the legal questions raised in the Bob Jones and Goldsboro cases, letters were received from Congressman Trent Lott expressing interest and views on the matter. In April 1981, Congressman Lott sent a letter to the Attorney General in which he urged the Department to reverse the legal position it advanced in the court of appeals in the Bob Jones case. On behalf of the Attorney General, I responded to Congressman Lott and informed him that the Department intended to acquiesce in the grant of certiorari in the Bob Jones case.

On October 30, 1981, Congressman Lott sent another letter to the Attorney General in which he advanced several legal reasons for the Department to reverse its legal position in the Bob Jones litigation. On December 15th, I informed the Congressman by letter that the United States would continue to argue in support of IRS authority to deny tax exemptions on the ground of federal public policy since the Department of Treasury, the client in the case, had not decided otherwise.

On December 21, 1981, I received a letter from Congressman Lott again urging that the Department of Justice reconsider its legal position in the Bob Jones case. Attached to that letter was what appeared to be a page from the President's correspondence log indicating the concurrence of the President with the views of Congressman Lott.

As with countless controversial cases involving the United States, the Department of Justice was aware of the views and concerns voiced by Members of Congress and others in the Bob Jones and Goldsboro litigation. On the other hand, the Department of Justice is entrusted with the responsibility of faithfully executing the laws and interpreting the Constitution and statutes. It would be a breach of this obligation if the Department of Justice were to depart from an objective legal analysis for political or other reasons. I can assure this Committee that the decision made by the Department to advise the Treasury Department that the Internal Revenue Service lacked authority to deny tax exemptions on the ground of federal public policy was made solely on the basis of objective legal analysis.

Mr. Chairman, I cannot state emphatically enough that this decision was compelled by the Department's view of the law -- specifically Section 501(c)(3) of the Internal Revenue Code of 1954. The pertinent language of Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals . . ." 26 U.S.C. Sec. 501(c)(3) (emphasis added). That language was interpreted by the three-judge federal district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), as requiring organizations satisfying any of the enumerated purposes also to be "charitable" in the common-law sense -- that is, in the sense that the organization's purposes and practices must accord with public policy -- in order to qualify for tax-exempt status. Green was summarily affirmed by the Supreme Court. Coit v. Green, 404 U.S. 997 (1971). However, summary affirmances traditionally have little precedential value, and in this instance, as the Supreme Court has itself subsequently noted, the special circumstances involved in Green made the summary affirmance of no binding significance.[1]

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[1] The Service's 1970 reinterpretation of Section 501(c)(3) was spurred by the Green litigation. In Green, parents of black public school students sued to enjoin the United States from according tax-exempt status under Sec. 501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Sec. 501(c)(3), but it reversed its position prior to entry of the district court's

Thus, the core question remainedunresolved: did Congress intend by enactment of Section 501(c)(3) to authorize the Internal Revenue Service to withhold tax-exempt status from otherwise qualified organizations based on the organizations' adherence to practices deemed by the Service to conflict with public policy. As set forth in detail in the analysis of legal authorities submitted today, an examination of congressional intent has led the Department of Justice to conclude that it did not.

The search for legislative intent begins, of course, with the words of the statute to be construed. Congress, by separately enumerating eight distinct purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them in the disjunctive with the word "or," manifested a clear intent to accord tax-exempt status to any entity organized and operated for any one of the enumerated purposes or functions. This common-sense interpretation of the language of Section 501(c)(3) is reinforced by the settled canon of statutory construction requiring that related provisions be interpreted _in para materia_. Sections 503, 504, and 513 of the Code, sister provisions of Section 501(c)(3),

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1/ (cont/d)
final decision in favor of plaintiffs. The Supreme Court's summary affirmance of _Green_, therefore, "lacks the precedential weight of a case involving a truly adversary controversy" and leaves open in the Supreme Court the question whether Section 501(c)(authorizes denial of tax-exempt status to racially discriminatory private schools. _Bob Jones University_ v. _Simon_, 416 U.S. 725, 740 n. (1974).

reiterate the separate and disjunctive purposes and functions described in Section 501(c)(3), thus reflecting the congressional intent to recognize each of the enumerated categories as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. Sections 503(b)(3) (1969), 504(a)(1) and (3) (1969), and 513(a).

Indeed, the regulations promulgated by the Service under Section 501(c)(3) expressly provide that "each of the purposes specified in [Section 501(c)(3)] . . . is an exempt purpose in itself [and] an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . ." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(1)(iii).

Where statutory language is so clear and unambiguous, courts traditionally decline to examine legislative history. See, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976). We did not end our inquiry with the plain meaning of the Code provision, however. Rather, we undertook a comprehensive review of the legislative history to ascertain whether it revealed support for the proposition that Congress intended to deny tax-exempt status to otherwise qualified organizations deemed by the Internal Revenue Service to violate public policy. We found none.

The provisions now contained in Section 501(c)(3) originated as part of the Tariff Act of 1894, which exempted from taxation organizations "conducted solely for charitable, religious or educational purposes." There is nothing in the legislative history of this early revenue act, nor in the legislative history of the many subsequent congressional reenactments of this same basic provision, indicating that Congress intended that bona fide "educational" or "religious" organizations must also meet all characteristics of a common-law charity.

To the contrary, the interpretive regulations issued by the Internal Revenue Service in connection with these revenue acts, and followed by the Service for over 50 years, uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense. Not until 1959 did the Internal Revenue Service broaden its regulatory definition of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. Sec. 1.501(c)(3)-1(d)(2). Even then, however, that same regulation, defines "educational" without any reference to the concept of charity, thus reflecting the Service's pre-1970 view that, although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under Section 501(c)(3).

In sum, Mr. Chairman, we were unable on the most painstaking examination of the statute and its history to find support for the position -- advanced by the IRS for the first time in 1970 -- that private schools pursuing racially discriminatory policies could be denied a tax exemption. Indeed, the IRS had itself long maintained that such a denial would be unauthorized agency action. It was in fact arguing that very position in Green at the time of its sudden reversal in 1970 on explicit directions from the White House.

Nor could we find evidence of congressional action subsequent to 1970 that suggests ratification by both the House and Senate of the Service's practice in this area over the last eleven years. To the contrary, Congress recently expressed grave reservations concerning the authority of the IRS to deny tax-exempt status to organizations deemed to be in violation of public policy. Sponsors in both the House and the Senate of the Ashbrook Amendment to the Treasury, Postal Service and General Government Appropriations Act of 1980 maintained that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory practices. In barring the prospective use of funds for such purposes in the Ashbrook Amendment, Congress made it abundantly clear that it was leaving undisturbed the status quo with regard to denials of tax exemptions between 1970 and 1978 so as to provide a full opportunity for the legislature to consider the correctness of the Service's interpretation of Section 501(c)(3). By no conceivable stretch of the imagination can this legislative activity in connection with a rider to an appropriations bill be regarded as approval or ratification of the very construction of Section 501(c)(3) that was at the time being so roundly criticized.

The legal conclusion seemed to us, Mr. Chairman, to be inescapable. Congress intended -- as deduced from the statute's language and legislative history, the Service's interpretive regulations, and subsequent congressional activity -- that Section 501(c)(3) exempt from income taxation "educational" organizations that are not also "charitable" as surely as it exempts "charitable" organizations that are not also "educational." The contrary construction accorded the statute by the district court in Green and the Fourth Circuit Court of Appeals in Bob Jones and Goldsboro does a disservice to the most basic canons of statutory construction and we cannot in good conscience support that position.

In reaching this conclusion, we looked as well at Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, to determine whether the grant of a tax exemption to a private school that racially discriminates would violate that federal statute. As you know, Mr. Chairman, Title VI prohibits racial discrimination under any program or activity "receiving Federal financial assistance," and the claim has been made by some that a tax exemption can be regarded as such assistance.

Quite frankly, this contention is wholly without merit. Title VI defines "Federal financial assistance" in terms of specified generic types of aid: grants, loans and contracts other than contracts of insurance or guaranty. None of these categories, understood in their ordinary sense, includes tax exemptions. This is underscored by the legislative history of the 1964 Act, which includes considerable discussion of the types of federal funding that would bring a program or activity within Title VI coverage and nowhere mentions tax exemptions as triggering such a result.

There is one district court case, McGlotten v. Connally, 338 F. Supp. 448 (1972), that equates tax exemptions with "Federal financial assistance." In reaching that result, the district court conceded that its conclusion found no support in either the language, agency interpretations, or the legislative history of Title VI. Nonetheless, it held that the "plain purpose" of the statute to promote nondiscrimination was sufficient to override the plain language and one-sided legislative history.

The logic of such reasoning has far-reaching ramifications. In essence, the district court in McGlotten viewed a tax exemption as a government subsidy, inexplicably equating it with a distribution of federal funds. If this view were to prevail, essentially all property and earnings of private parties would effectively belong to the government and a failure of Congress to tax would constitute federal financial assistance. The Supreme Court explicitly rejected that concept in Walz v. Tax Commission, 397 U.S. 664, 675 (1970), holding that a state tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organizations. In our view, Walz is a complete answer to the Title VI assertion made in the McGlotten decision.

Having reached the conclusion that an argument to support the interpretation that had been given to Section 501(c)(3) since 1970 should not be advanced in the Supreme Court, we felt compelled to recommend to the Treasury Department that it no longer pursue that course. There was clear recognition at both the Department of Justice and the Department of the Treasury that such a reversal of position would likely be misunderstood and mischaracterized by many as encouragement, or at the very least tolerance, on the part of the government of what are sometimes referred to as "segregation academies." When confronted with the identical politically explosive issue in 1970, the Nixon Administration allowed the IRS to proceed down a path that was politically attractive but legally unjustifed. One can certainly suggest that legislation should have been enacted in 1970 to accomplish the desired result.

This Administration, Mr. Chairman, has, as you well know, declined to operate on such a basis. The President has time and again demonstrated his commitment to principle over political expediency. As a consequence, decisions have been made, and policies have been initiated, that evoke strong public criticism but are able to withstand the assaults because they are grounded on high principle. This is but another example of the Administration's commitment to that approach.

Here, the principle involved is among the most fundamental to our system of democratic government. The first sentence of the Constitution declares: "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." This provision, and similar grants of power to the Executive and Judicial Branches in Articles II and III of the Constitution, reflect a scheme of checks and balances integral to freedom and ordered liberty. Under Article II of the Constitution, once the meaning of a law is discerned, the Executive is charged with its faithful execution.

The Internal Revenue Service's practice since 1970 of denying tax exemptions to private schools that discriminate runs directly counter to that constitutional scheme. It opens the door for administrative agencies to "legislate" by administrative fiat, and, without guidance from Congress, to make fundamental policy decisions that impact directly on every citizen in this country. Such transgressions by the Executive on Congressional prerogatives are most inviting where the end being sought -- *i.e.*, the removal of racial discrimination in our educational institutions -- is a common objective to which all

Branches of Government subscribe. But, it is in precisely such circumstances that we must be sure that principle wins out over emotion, no matter how difficult the decision may be.

Mr. Chairman, the power to grant or deny exemptions from taxation is legislative in nature. Congress has not yet authorized the Internal Revenue Service to withhold exemptions from private schools on the ground that they practice racial discrimination. The President has forwarded to the Congress legislation that would grant the IRS such authority. He has asked that you give this matter the very highest priority and enact the legislation as rapidly as possible.

This Administration is concerned with, and sensitive to, minority interests and civil rights concerns. In enforcing the many federal statutes that afford protections in this as well as other areas, we must, of course, uncompromisingly discharge our responsibility to uphold the Constitution and laws of this land. That responsibility cannot be carried out faithfully, and with full integrity, if we allow administrative agencies, no matter how well intended, to act on their own in seeking to achieve even the most laudable ends.

That was the fundamental issue in the Bob Jones and Goldsboro cases, and it was for the reasons that I have stated that the Department of Justice concluded as a matter of law, notwithstanding our repugnance for the racially discriminatory practices of the two schools, that the IRS practice since 1970 could no longer be supported.

Mr. Reynolds and I will be glad to answer any questions you may have.

/An attachment to this statement, "Analysis of Legal Authorities for Possible Inclusion in a Brief," dated January 29, 1982, is included in the documents assembled by staff in the appendix to this hearing./

Chairman ROSTENKOWSKI. Mr. McNamar, you may proceed.

STATEMENT OF RICHARD T. McNAMAR, DEPUTY SECRETARY, DEPARTMENT OF THE TREASURY, ACCOMPANIED BY PETER WALLISON, GENERAL COUNSEL

Mr. McNAMAR. I, too, can abbreviate my statement somewhat, but would appreciate the opportunity to take the committee through the part which I think is most germane. With me today from the Treasury Department is our General Counsel, Peter J. Wallison.

We are pleased to appear before the committee to present the views of the Treasury on the administration's bill. This bill would deny the benefits of tax-exempt status to organizations maintaining private schools that follow racially discriminatory practices.

Indeed, in light of the controversy that has developed in this area in recent weeks, we are especially pleased to have an opportunity to dispel some of the confusion and misconceptions regarding the policy of this administration both with respect to racially discriminatory schools and the appropriate role of the Internal Revenue Service.

At the outset, we wish to emphasize the following points:

The Reagan administration is unalterably opposed to racial discrimination in any form. Further, the administration endorses, in the strongest fashion, the principles of *Brown* v. *Board of Education,* that racial discrimination in education has no place in a free society and should not in any way be tolerated or encouraged by the Government.

Thus, the administration believes that racially discriminatory schools, and the organizations that maintain them, should not be recipients of tax deductible contributions. However, we recognize that protection must be accorded to the legitimate exercise of religious beliefs.

While the administration believes that the benefits of tax exemption should be denied to racially discriminatory schools, it also believes that such a position must be based on statute. However popular it would have been to come out the other way, we and the Justice Department are unable to find that Congress has yet authorized such action in the Internal Revenue Code.

It is not satisfactory to say that the tax laws permit the Internal Revenue Service to require that tax exempt organizations must comply with certain fundamental public policies. If we follow this approach, at any time the Service may go beyond racial discrimination and decide that some other policy—such as discrimination based on sex—requires the revocation of tax exemptions for schools which admit only women. Instead, we believe that Congress should authorize the denial of tax exemption based only on racial discrimination by passing a law to this effect. That is why the administration has submitted the bill that is before this committee today.

Against this background, I would like to turn to the rationale for the administration's decision which on the statement that was previously provided to you is at the top of page 10. The decision announced on January 8, 1982, had its origins in a policy determination by the Nixon White House in 1970. That decision directed the

Service to accede to the position of the plaintiffs in the first *Green* case in the Federal district court. This reversed the longstanding IRS opposition to involving the administration of the tax laws in the controversy surrounding racial discrimination.

Although this decision advanced a laudable goal, the 1970 decision was not soundly based on statutory law and the consequences of this expedient approach were finally recognized in late 1981 when the Treasury Department was required to approve the Justice Department brief which articulated the legal rationale adopted in 1970.

The Justice Department has prepared and delivered to the Treasury Department a memorandum of law which describes the legal deficiencies in the Service's position. As the Justice Department memorandum concludes, there is no adequate basis in law for the Service's position that it has the authority to select certain Federal public policies and impose these policies on tax exempt organizations.

Nor is there a legal basis for concluding that the IRS has the statutory authority to invoke section 501(c)(3) and the attendant denial of deductions under section 170 to any school or university that violates the civil rights laws. The Justice Department memo makes clear that there is no statutory language or congressional direction, no legislative history, and no definitive Supreme Court opinion, that authorizes or requires the IRS to revoke the tax exemptions of schools that do not comply with Federal public policy or otherwise violate the civil rights laws.

The committee should note that there is no question that the Internal Revenue Service was under tremendous pressure to adopt the view it took in 1970, and has acted professionally and responsibly. However, the "public policies" rationale the Service adopted was a post hoc legal justification for a prior policy action.

In making the Treasury's policy decision we were faced with a classic moral dilemma. "Does the end justify the means?" That is, does the attainment of a good end or objective (eliminating discrimination) justify the endorsement of a theory that we regarded as unauthorized by law? This ethical dilemma has been long settled in all civilized societies. The answer is clearly "No."

In addition, in the United States we have consistently adhered to the trite-sounding but immutable principle that we will have "a government of laws and not of men," and that is what this matter is all about. Should administrators and executives of the law be free to define "public policy" in the absence of legislative authority duly enacted by Congress? Again, the answer is "No."

The implications of continuing the policy of allowing the IRS to determine on its own those public policies denying tax exemptions was well stated by the district court in the *Bob Jones* case. There, the judge pointed out that section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend Federal public policy? Who decides? With a change of Federal public policy, the law would change without congressional action—a dilemma of constitutional proportions. Citizens could no longer rely on the law of section 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day.

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For example, if we were to endorse the theory on which the Service was proceding before the Supreme Court, what would prevent the Service from revoking the tax exempt status of Smith College, a school open only to women? Does sex discrimination violate a clearly enunciated public policy? Apparently someone in the State of Massachusetts thinks so, because litigation on this issue is currently going forward in the State courts of Massachusetts.

What about religious organizations that refuse to ordain priests of both sexes? And could the Commissioner decide that if black Muslim organizations refuse to admit whites they should be denied a tax exempt status because they discriminate?

Further, should the IRS Commissioner be permitted—in the absence of legislation—to determine what is national policy on abortion? Should hospitals that refuse to perform abortions be denied their tax exempt status? Or, reading Federal policy another way, should hospitals that do perform abortions be denied their tax exempt status?

These extremely difficult but real issues illustrate the need for congressional action on the question of tax exempt schools which discriminate on the basis of race. Here perhaps we have a national consensus which should be embodied in statute so that the Internal Revenue Service has appropriate guidance. To leave the judgment solely to the Service is not the responsible course.

It is simply because these issues are so difficult and fundamental to our society that they should not be left to an administrative determination by employees of the Federal Government, but rather should be determined by the elected representatives of the American people. It is for this reason that the administration has developed and proposed the administration's bill which is designed to give a clear congressional mandate on these matters.

Thus, the administration urges the Congress to exercise its authority and responsibility to provide guidance on these matters so that there will be a basis in law to deny tax-exempt status to educational institutions that discriminate on the basis of race.

Finally, I turn to a description of the administration's bill, which is before the committee this afternoon. Section 1 of tha bill directly addresses the issue before us. Specifically, a new section 501(j) would be added to the Internal Revenue Code to deny 501(c)(3) treatment and 501(a) treatment if the school practices racial discrimination.

Failure to be described in section 501(c)(3) also means that the organization is not within the exemptions from Federal social security and employment taxes provided in the code. Correlative changes are made to the income, estate, and gift-tax deduction sections to provide that no deduction will be allowed for contributions to such organization.

The organizations covered are defined in new section 501(j)(1) to include those that maintain a regular faculty and curriculum, and normally have a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. Generally, this is the same definition as appears in code section 170(b)(1)(A)(ii), and parallels the class of schools covered by the

IRS's prior published procedures. Further, consistent with Rev. Rul. 75-231, the definition covers all organizations maintaining these schools.

New code section 501(j)(2) defines "racially discriminatory policy." Generally, under the bill, a school has such a policy if it refuses to admit students of all races (defined to include also color and national origin) to the rights, privileges, programs, and activities usually accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, or other programs in a manner that does not discriminate on the basis of race. This definition generally conforms to that first established by the court in the *Green* litigation and carried forward by the IRS in Rev. Rul. 71-447 and subsequent pronouncements.

Additionally, section 501(j)(2) contains an explicit provision in recognition of the legitimate interests of religious-based schools. Thus, under the bill, an admissions policy or a program of religious training or worship that is limited to, or grants preference or priority to, members of a particular religious organization or belief would not be considered a racially discriminatory policy.

Thus, schools may confine admission and training to persons of a particular religion. The protection, however, will not apply if the policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race. Pursuant to this rule, we expect that Bob Jones and Goldsboro would be denied their tax-exempt status if they continue their past racial practices.

To insure that the express congressional sanction does not grant a windfall to discriminatory schools and their contributors, previouly denied the benefits of exemption, the legislation applies retroactively to July 10, 1970, the date the IRS first announced it would not grant exemption to private schools with discriminatory policies. We believe that a retroactive effective date is essential to preserve the national policy of denying tax-exempt status to schools that racially discriminate, and that the retroactivity is constitutional.

Finally, the bill contemplates that present procedures; that is, administrative procedures, regarding grant or denial of tax exemption will remain in place. Thus, a nonexempt organization must generally submit to the IRS an application requesting recognition of exemption, together with supporting material enabling the IRS to rule on all relevant issues, including racial discrimination. Organizations whose exemptions have been recognized will be subject to periodic examination to insure continuing compliance with all applicable requirements.

If discrimination is found to exist, revocation will be proposed and advance assurance of deductibility of contributions will be suspended. Thereafter, the organization will be accorded substantial administrative appeal, including review by the national office. If the finding of discrimination is sustained, exemption will be revoked and the organization, of course, has the opportunity to seek judicial review.

We have proposed this legislation to deal with the immediate need to empower the Internal Revenue Service with unmistakable authority to deny tax exemption to racially discriminatory schools.

We recognize that it will not resolve the difficult definitional problems faced by the Internal Revenue Service in giving meaning to such general terms as "charitable" and "educational," and we invite further congressional action to define better standards in those areas as well.

We will, pending such action, continue to support the Internal Revenue Service in applying the 1959 regulations in the charitable area and in its efforts to deny exemption to those organizations engaged in illegal activities.

This concludes my testimony. I will be pleased to answer any questions you may have.

[The statement of Mr. McNamar follows:]

For Release Upon Delivery
Expected 10:00 a.m. EST

STATEMENT OF
THE HONORABLE R.T. MCNAMAR
DEPUTY SECRETARY OF THE TREASURY
BEFORE THE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
FEBRUARY 4, 1982

Mr. Chairman and Members of the Committee:

With me from the Treasury Department is our General Counsel, Peter J. Wallison.

We are pleased to appear before the Committee to present the views of the Treasury on the Administration's bill. This bill would deny the benefits of tax exempt status to organizations maintaining private schools that follow racially discriminatory practices.

Indeed, in light of the controversy that has developed in this area in recent weeks, we are especially pleased to have an opportunity to dispel some of the confusion and misconceptions regarding the policy of this Administration both with respect to racially discriminatory schools and the appropriate role of the Internal Revenue Service.

At the outset, we wish to emphasize the following points:

The Reagan Administration is unalterably opposed to racial discrimination in any form. Further, the Administration endorses, in the strongest fashion, the principles of Brown v. Board of Education, that racial discrimination in education has no place in a free society and should not in any way be tolerated or encouraged by the Government.

Thus, the Administration believes that racially discriminatory schools, and the organizations that maintain them, should not be recipients of tax deductible contributions. However, we recognize that protection must be accorded to the legitimate exercise of religious beliefs.

While the Administration believes that the benefits of tax exemption should be denied to racially discriminatory schools, it also believes that such a position must be based on statute. However popular it would have been to come out the other way, we and the Justice Department are unable to find that Congress has yet authorized such action in the Internal Revenue Code.

It is not satisfactory to say that the tax laws permit the Internal Revenue Service to require that tax exempt organizations must comply with certain fundamental public policies. If we follow this approach, at any time the Service may go beyond racial discrimination and decide that some other policy -- such as discrimination based on sex -- requires the revocation of tax exemptions for schools which admit only women. Instead, we believe that Congress should authorize the denial of tax exemption based only on racial discrimination by passing a law to this effect. That is why the Administration has submitted the bill that is before this Committee today.

Against this background, I would like to discuss in some detail three specific areas that are of appropriate interest to the Congress and the American public. They are:

1. The chronology of events in reaching the joint Treasury and Justice decision not to file a brief in support of the position of the Internal Revenue Service before the Supreme Court.
2. The rationale for this decision.
3. A discussion of the Administration's legislation.

CHRONOLOGY OF EVENTS

Although it is unusual for any agency to recount in detail the events which led to a particular legal or policy decision, Congress has indicated a desire to inquire into this matter and there have been allegations that the decision was the result of a political choice. On the contrary, as the chronology of events will show, the decision was the result of a careful, thorough legal analysis, and was made despite a recognition of the politically unpopular nature of that decision. In fact, the events show that the Treasury and Justice Departments hoped to be persuaded that the Service's policy of administratively denying tax exemptions to schools that racially discriminate was supportable.

The decision announced on January 8 was not an easy one and in my view presented an issue that should have been confronted in 1970 when the Service, at the request of the Nixon White House, adopted a position which was then being advanced by the plaintiffs in the first Green case. In that case, plaintiffs argued that the Service was authorized to deny tax exemptions to racially discriminatory schools because all tax exempt entities had to be "charitable" in the common law sense amd as such had to pursue certain fundamental public policies. One of these fundamental public policies was non-discrimination on the grounds of race.

In adopting the position of the plaintiffs in Green v. Connally, the Service achieved a satisfactory outcome in that particular case; it could deny tax exemptions to racially discriminatory schools. But there was a broader issue involved, which was not adequately considered at the time. If the Service could require tax exempt schools to follow a policy of racial non-discrimination, could it also impose other policies on the ground that they too were Federal public policies? In other words, did this legal principle establish a basis for IRS actions which went well beyond the laudable objective of prohibiting racial discrimination?

After eleven years, when it came time for a subsequent Administration to file a brief in the Supreme Court endorsing the legal theory adopted by the Service in 1970, that issue had to be faced squarely. In December 1981, as the time for filing a Supreme Court brief approached, the question could no longer be avoided, and after extensive review of the law the Treasury and Justice Departments were compelled to conclude the theory adopted by the Service in 1970 could not be rationalized under existing statutes on either a legal or a policy basis, because it would confer on the Service a breadth of discretion that no administrative agency should have.

The decision to grant Bob Jones University its tax exemption was made as a matter of policy and law, and involved politics only in its broadest and best sense -- the mandate of the Reagan Administration to assure that the Government of the United States acts responsibly and in accordance with the laws enacted by Congress. Let me summarize what the Chronology of Events shows and include all my contacts with the White House.

I first became aware that there was a concern over our legal position in the Bob Jones case when Deputy Attorney General Ed Schmults called me on the evening of December 8 and asked if I were aware of the Bob Jones case. I indicated I knew of its existence and that it involved tax exempt status for religious schools that practiced racial discrimination. He indicated that the Justice Department was reviewing the legal papers it was preparing for the Supreme Court on December 31. He asked that I look into the matter because it involved important policy issues and get back to him.

I subsequently informed Secretary Regan about the Justice Department's concerns in the Bob Jones case sometime during the week of December 14, at one of the frequent meetings we have during any given week. He did not suggest that I come to any particular conclusion. Rather, he indicated he wanted to be kept apprised over the Christmas vacation.

As we reviewed the legal basis for our position, the Treasury began to have concerns about the policy issues which were then under review in the Justice Department. However, in an effort to continue supporting the Service's position, we agreed to postpone any decision until we all had a chance to read the brief being prepared by the Solicitor General's office. About this time, I informed Fred Fielding, White House Counsel, of our growing concern about the case and the government's position. I later met with him in his office, on December 22, to explore the legal problems of the case, and indicated we were awaiting the Solicitor's brief supporting the Service.

Subsequently, on Monday, December 28, Secretary Regan informed me that Ed Meese wished to be apprised of the case. That afternoon I phoned Meese and told him that I was concerned about our position, that we had informed Fielding and that we all recognized the political sensitivity of taking a legal position that might be construed as contrary to the Administration's policy against racial discrimination. He pressed me to be sure that the Justice and Treasury Departments were absolutely comfortable with their position on the law before taking any action. I indicated that we were waiting for the final Justice Department draft brief supporting the IRS position before we made any decision.

On the evening of December 23, I read the initial Justice Department draft of the brief for the Supreme Court. The brief supported the IRS position that it had authority to deny the tax exemptions. I was unpersuaded by the logic or the legal citations. I then asked for a second draft brief narrowed to the issue of racial discrimination. However, the second draft, which I received on December 29, was still based on the theory that the Service could determine that certain Federal public policies could be used as a precondition for obtaining and retaining tax exempt status. Given two tries, there was apparently no legal theory that would permit the Service to deny tax exemptions on the basis of racial discrimination without also giving the authority to deny or revoke exemptions on other grounds.

I, therefore, concluded that the Treasury could no longer support the IRS on this matter, because the Government would be required to take a position in the Supreme Court that we simply did not regard as being either supported by statutory authority or adequately determined by the relevant case law and appropriate policy.

On December 30 the Deputy Attorney General, the Assistant Attorney General for Civil Rights and I met with Fred Fielding and others to tell Fielding of Treasury's preliminary decision. I talked to Secretary Regan in person on December 28 and by telephone on December 30. At no time during this process did either Fielding or Regan attempt to influence my judgment of the legal issues in the case or order me to reach any particular conclusion. I also had no contact with any Congressmen or Senators in making this decision.

In an effort to be certain that the Departments of Justice and Treasury were legally correct on a matter of such important national policy, we requested a one-week extension from the Supreme Court and reviewed the matter several times with the Commissioner and the Chief Counsel of IRS, the Treasury Department's Office of Tax Policy and with the Justice Department.

During this period, a number of the initial thoughts in our discussions were reduced to a draft memorandum by the Department of Justice -- the unsigned, undated copy of which has been furnished to this Committee -- and the final decision was made on January 8. This additional time permitted a thorough review of my decision by all the relevant senior officials in the Justice and Treasury Departments who might have a perspective on the case. By January 8 we were ready to announce our decision. Since we could not support the Service's position before the Supreme Court, there was no choice but to grant the tax exemptions which were the subject of the suit. I was out of Washington and by phone I directed the Commissioner of Internal Revenue to take the actions necessary to grant these exemptions. Since the case before the Supreme Court was now moot, the Justice Department filed a memorandum with the Supreme Court seeking to have the court vacate its jurisdiction.

RATIONALE FOR TREASURY DECISION

The decision announced on January 8, 1982, had its origins in a policy determination by the Nixon White House in 1970. That decision directed the Service to accede to the position of the plaintiffs in the first Green case in the Federal District Court. This reversed the long-standing IRS opposition to involving the administration of the tax laws in the controversy surrounding racial discrimination. Although this decision advanced a laudable goal, the 1970 decision was not soundly based on statutory law and the consequences of this expedient approach were finally recognized in late 1981 when the Treasury Department was required to approve the Justice Department brief which articulated the legal rationale adopted in 1970.

The Justice Department has prepared and delivered to the Treasury Department a memorandum of law which describes the legal deficiencies in the Service's position. As the Justice Department memorandum concludes, there is no adequate basis in law for the Service's position that it has the authority to select certain Federal public policies and impose these policies on tax exempt organizations. Nor is there a legal basis for concluding that the IRS has the statutory authority to invoke Section 501(c)(3) and the attendant denial of deductions under Section 170 to any school or university that violates the civil rights laws. The Justice Department memo makes clear that there is no statutory language or Congressional direction, no legislative history, and no definitive Supreme Court opinion, that authorizes or requires the IRS to revoke the tax exemptions of schools that do not comply with Federal public policy or otherwise violate the civil rights laws.

The Committee should note that there is no question that the Internal Revenue Service was under tremendous pressure to adopt the view it took in 1970, and has acted professionally and responsibly. However, the "public policies" rationale the Service adopted was a *post hoc* legal justification for a prior policy action.

In making the Treasury's policy decision we were faced with a classic moral dilemma. "Does the end justify the means?" That is, does the attainment of a good end or objective (eliminating discrimination) justify the endorsement of a theory that we regarded as unauthorized by law? This ethical dilemma has been long settled in all civilized societies. The answer is "no."

In addition, in the United States we have consistently adhered to the trite-sounding but immutable principle that we will have "a government of laws and not of men," and that is what this matter is all about. Should administrators and executives of the law be free to define "public policy" in the absence of legislative authority duly enacted by Congress? Again, the answer is "no."

The implications of continuing the policy of allowing the IRS to determine on its own those public policies denying tax exemptions was well stated by the district court in the *Bob Jones* case. There, the judge pointed out that Section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over such broad power, the district court observed: "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action -- a dilemma of constitutional proportions. Citizens could no longer rely on the law of Section 501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny."

For example, if we were to endorse the theory on which the Service was proceeding before the Supreme Court, what would prevent the Service from revoking the tax exempt status of Smith College, a school open only to women? Does sex discrimination violate a clearly ennunciated public policy? Apparently someone in the state of Massachusetts thinks so, because litigation on this issue is currently going forward in the state courts of Massachusetts.

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Thus the Administration urges the Congress to exercise its authority and responsibility to provide guidance on these matters so that there will be a basis in law to deny tax exempt status to educational institutions that discriminate on the basis of race.

DISCUSSION OF LEGISLATION

Finally, I turn to a description of the Administration's bill, which is before the Committee this afternoon ~~morning~~. Section one of that bill directly addresses the issue before us. Specifically, a new Section 501(j) would be added to the Internal Revenue Code to deny 501(c)(3) treatment and 501(a) treatment if the school practices racial discrimination.

Failure to be described in Section 501(c)(3) also means that the organization is not within the exemptions from Federal social security and employment taxes provided in the Code. Correlative changes are made to the income, estate and gift tax deduction sections to provide that no deduction will be allowed for contributions to such organization.

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Additionally, Section 501(j)(2) contains an explicit provision in recognition of the legitimate interests of religious-based schools. Thus, under the bill, an admissions policy or a program of religious training or worship that is limited to, or grants preference or priority to, members of a particular religious organization or belief would not be considered a racially discriminatory policy. Thus, schools may confine admission and training to persons of a particular religion. The protection, however, will not apply if the policy, program, preference or priority is based upon race or upon a belief that requires discrimination on the basis of race. Pursuant to this rule, we expect that *Bob Jones* and *Goldsboro* would be denied their tax exempt status if they continue their past racial practices.

To ensure that the express congressional sanction does not grant a windfall to discriminatory schools and their contributors, previously denied the benefits of exemption, the legislation applies retroactively to July 10, 1970, the date the IRS first announced it would not grant exemption to private schools with discriminatory policies. We believe that a retroactive effective date is essential to preserve the national policy of denying tax exempt status to schools that racially discriminate, and that the retroactivity is constitutional.

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We have proposed this legislation to deal with the immediate need to empower the Internal Revenue Service with unmistakable authority to deny tax exemption to racially discriminatory schools. We recognize that it will not resolve the difficult definitional problems faced by the Internal Revenue Service in giving meaning to such general terms as "charitable" and "educational," and we invite further Congressional action to define better standards in those areas as well. We will, pending such action, continue to support the Internal Revenue Service in applying the 1959 regulations in the charitable area and in its efforts to deny exemption to those organizations engaged in illegal activities.

This concludes my testimony. I will be pleased to answer any questions you may have.

Chairman ROSTENKOWSKI. Thank you, Mr. McNamar.

In your discussion, you referred to legislation that is pending before the committee. I would like to point out that there is no legislation before the Ways and Means Committee. That is not under consideration. This is an oversight hearing as to whether or not there is a need for legislation.

You were here this morning, of course. There was a great deal of testimony as to the fact that there is no need for any legislation.

Mr. CONABLE. Mr. Chairman, we do have a bill, however, that was put in by the request of the President that is before the committee.

Chairman ROSTENKOWSKI. I understand that.

Mr. Gibbons will inquire.

Mr. GIBBONS. Mr. Schmults, you are a lawyer. Could you please explain to the committee what your impression is of the role of the judiciary in our constitutional scheme? I ask this question because as I sit here, I worry about where we are all coming from, or where we are headed, really.

For instance, there is no statutory exemption to exclude from income all of the social security benefits that people receive. I don't even want to ask you the question because I know what your answer would be. You are not planning on taxing those because there is no statutory exemption for it. It is just an administrative decision that has never been overturned by this Congress or by the courts.

Then in view of the long—of the *Green* case, the *Connally* v. *Green,* and all of the other cases, and a constant affirmance by the courts, you come in here and say there is no law on the question.

I repeat again, could you please explain to me what your impression is of the role of the judiciary in our constitutional scheme?

Mr. SCHMULTS. The role of the judiciary, Mr. Gibbons, is to decide cases that come before them, to decide disputes between litigants and to interpret the law and apply it to specific fact situations.

Mr. GIBBONS. You mean that for all these years that this has been in the courts, that no court, no litigant, ever said there was no law in the case, there was no law to be enforced or interpreted? We have temporary injunctions, we have permanent injunctions. We have a lot of people that have been all up and down the line on this matter, and you say there is no law on the case?

I realize we went to school at different times and at different places, but I was never instructed in the law in that regard.

Mr. SCHMULTS. Well, Mr. Gibbons, you know there was clearly a dispute in all of the cases, in every case that you have mentioned and in the *Bob Jones* and *Goldsboro* cases there were litigants taking both sides of the law. I think what is an interesting point to make in that connection was that the Supreme Court has itself said that the question of whether the Internal Revenue Service has authority to deny tax exemptions to schools that discriminate on the basis of race is an open question.

Indeed, the very cases that we are talking about were before the Supreme Court, so while it is true there were some lower court decisions holding that the IRS did have such authority, nevertheless, at the Department of Justice, we found ourselves confronted with the possibility of taking a position in the Supreme Court that, on close legal analysis, we found we simply could not take and be faithful to our obligations at the Department to interpret the law and to make our best representation of what we thought the law provides to the Supreme Court.

We simply could not take that position. We advised our client, the Treasury Department, of that. The Treasury Department reviewed an analysis of the law really on both sides of the question, and agreed with the conclusions of the Justice Department that the position could no longer be maintained.

Our point now is that we think on such an important issue, on which we all agree, and that is that private schools that discriminate on the basis of race should not have tax exemptions, that the Congress act on what the President has proposed, and that is enact legislation to clearly authorize the IRS to deny such exemptions and make this point clear in the law.

Mr. **Gibbons**. You are using up all of my time. I appreciate your full answer. You are a distinguished lawyer and you served as General Counsel for the Treasury in 1973 and 1974. You served as Under Secretary of the Treasury in 1974 to 1975.

During all of this time, this was a matter that was before the Treasury. Did you ever express to anyone your concern about the status of there not being any law at that time?

Mr. **Schmults**. In those years, Mr. Gibbons, I must say I don't—while I may have read some memos on the cases, they were not of particular concern at the Treasury Department. Those issues were probably being addressed in the context of whatever litigation was going on during that period by the Tax Division of the Department of Justice that represents the IRS in these cases and by the Chief Counsel of the IRS.

They were really not a matter of any consequence that I can recall in the General Counsel's Office at the Treasury Department while I was there.

Chairman **Rostenkowski**. Mr. Conable will inquire?

Mr. **Conable**. I pass.

Chairman **Rostenkowski**. Mr. Rangel will inquire?

Mr. **Rangel**. I am assuming that from the answer to Mr. Gibbons that none of you believe a case in a lower court is law? In other words, like the President, the four of you want the Congress to make the law clear, right?

Mr. **Reynolds**. I think we all recognize that case law is law. Certainly the decisions of the Supreme Court have weight of law.

Mr. **Rangel**. Not justice supreme.

Mr. **Reynolds**. It is also true, I believe, in the lower courts many decisions are contested on a regular basis and taken up on appeal to the court of appeals and the Supreme Court. The fact that a decision is rendered——

Mr. **Rangel**. Mr. Reynolds, please, Mr. Reynolds, my time is going to run out. You will recognize that if a lower court or appellate court reaches a decision, could you stretch your imagination to accept that as being the law?

Mr. **Reynolds**. I think if the court of appeals reaches a decision, it is the law of that circuit.

Mr. RANGEL. Did there come a time when the court of appeals reached a decision on the precepts of law that the Congress passed and it did go up to the U.S. Supreme Court and they did not re verse it?

Did that ever happen?

Mr. REYNOLDS. I believe on this particular issue, the three-judge district court in *Green* reached a decision and in *Prince Edward County,* I believe, a court of appeals reached it on a somewhat different—in a somewhat different context, but still the issue, actually Prince Edward's, did not present the same issue to the Supreme Court.

Mr. RANGEL. You have appeared and testified today that the Congress has not empowered the IRS to deny tax exemption to private schools that engage in racially discriminatory practices, is that your legal position?

Mr. REYNOLDS. That would be my legal position, yes, sir.

Mr. RANGEL. Has the Congress passed a law that empowers the IRS to deny tax exemption at all? Do you think there is any statutory authority for the IRS to deny tax exemption?

Mr. REYNOLDS. Certainly there is authority for the IRS to deny tax exemptions.

Mr. RANGEL. Do you believe that there is any existing law by the Federal courts to say that discrimination in private schools is unlawful?

Mr. REYNOLDS. I am sorry—could you repeat the question?

Mr. RANGEL. Is there any existing body of law developed by the courts that would say that private schools that discriminate based on color or race is unlawful conduct?

Mr. REYNOLDS. I believe *Runyon* v. *McCrary* in the Supreme Court, said that that is what 1981 does indeed prohibit.

Mr. RANGEL. If it is prohibited by the courts, could you say it is unlawful for a private school to discriminate against people because of their color or race?

Mr. REYNOLDS. Certainly, the Supreme Court said that in *Runyon* v. *McCrary*. I would say it is unlawful under 1981.

Mr. RANGEL. Then would it be legal for the IRS to deny tax exemption to an institution that was engaged in unlawful practices?

Mr. REYNOLDS. I believe, Congressman, that 1981 does not specify as a sanction for that kind of unlawful conduct that you would deny tax-exempt status. 501(c)(3) also does not specify that if that unlawful conduct takes place that you deny tax-exempt status. I do not see any law on the books where Congress has addressed that question and has reached a conclusion.

Mr. RANGEL. It is your belief that any act that the Congress did not specify as being unlawful, notwithstanding the fact that the conduct is unlawful, that the IRS has no legal authority to deny exemption?

Mr. REYNOLDS. I would have to look at the congressional delegation that is assigned to the IRS.

I don't think that the Congress has delegated to the IRS that kind of authority in the circumstances that we are talking about.

Mr. RANGEL. Let me ask you this, Mr. Reynolds. Assuming that we could enact legislation and we thought we knew what we intended, where do you believe that the interpretation of what we did lies in the White House or in the courts?

Mr. **Reynolds**. I actually believe the interpretation of what you did starts with the language of the statute, with the legislative history in Congress, the courts will look at that and interpret what was done.

Mr. **Rangel**. Then why have the four of you taken a look at the statutory language which has been reviewed for the last decade in the courts, and proceeded to ignore the courts and then tell us how you have interpreted the mandate of IRS?

Mr. **Reynolds**. Congressman, I think if you read the fourth circuit opinion and you read *Green,* you will find those courts did not even refer or look at the statutory language, nor did they go back to the legislative history. They jumped in instead with the 1959 regulation on how you define charitable and proceeded forward from that point.

What we did was take a look at the question by taking a look at the statute, legislative history and determining whether or not on that basis Congress did, indeed, direct that this is the kind of authority the IRS should be engaged in.

Mr. **Rangel**. So are you saying the courts never looked at the language of the statute? Never looked at the legislative intent? That they just made some decision based on the notions of public policy and so therefore, none of you had any more to go on before you reached this decision?

Let me——

Mr. **Reynolds**. I don't know what the courts looked at, sir, but I do know that different judges reached different conclusions when they looked at the question and there has been a lot of litigation since 1970 over the authority question that have not been resolved.

Mr. **Rangel**. Don't you realize because of that dispute, the issue went to the court? It is not up to the White House to determine whether they are right or wrong. If you don't like what they do, you go to Congress. You have arbitrarily ignored case law as it exists and proceeded to analyze the legislative intent.

I am saying you are really violating the Constitutional principles of separation of powers. In any event, I am not concerned with this. I think the Supreme Court and the Congress have been clear on this and the law would stand on its own two feet.

You have against you only the Constitution, the legal scholars, the American Bar Association, those of us in Congress and former administrators. The other side is what I am concerned about. It is obviously more powerful than anything that I have mentioned, which are the political considerations.

I have—and Mr. Chairman, the documents that have been shared with this committee, is that part of the record here?

Chairman **Rostenkowski**. Yes.

Mr. **Rangel**. Then I won't bother putting all of the memoranda and other data that we received prior to the time in which you made this decision into the record because it is already part of the record.

But, Mr. Reynolds, you being in charge of civil rights, have you always held this position that you testified to today, that you have had, as relates to the authority of IRS to grant or deny tax exemptions to schools that segregate?

Mr. REYNOLDS. Before the time that I looked into this question, when it came to the Division, I had not focused on the issue.

Mr. RANGEL. Well, then, Mr. Olson—has he worked for you, is he around anywhere? What is his title?

Mr. SCHMULTS. Mr. Olson is Assistant Attorney General for the Office of Legal Counsel.

Mr. RANGEL. Did he give any advice to the person in charge of civil rights as to the question of tax exemption? Have you received any legal information from Mr. Olson?

Mr. SCHMULTS. I believe you have a memo from Mr. Olson dated January 8, whereby—well, he didn't really express an opinion on what we regarded as the essential question as to whether there was statutory authorization for the IRS. Mr. Olson raised some points that should be considered as to legislative acquiescence, that is, whether there was any action by Congress after 1970 that would indicate legislative acquiescence.

If I may finish my answer——

Chairman ROSTENKOWSKI. The gentleman's time has expired. The Chair recognizes——

Mr. SCHMULTS. May I finish my answer?

Mr. RANGEL. I would just like to refer to a document dated January 8, written by Mr. Olson, No. 3, principles of statutory construction, the discussion over Reynolds memorandum principles of statutory construction is relatively brief. I believe that discussion does not accurately state the principles which have been enunciated repeatedly and recently by the Supreme Court.

Needless to say, no principle of statutory construction can be sufficiently taken care of if the courts cannot be convinced that the principles of construction are accorded the true intent of the legislature.

Therefore, I offer these observations, not because they dispose of the issue, but because I believe that the law on this subject is not adequately excused in the Reynolds memorandum.

The following citations are simply examples of what the Supreme Court has said—"He goes on to cite the authority of the IRS."

Mr. SCHMULTS. Those points have been addressed in a memo we submitted for the record today. The people who did the research did not believe the legislative acquiescence really bore much importance on the issue. Mr. Olson was kind enough to raise those issues and they have been addressed in the January 29 memo that reflects earlier advice.

Mr. RANGEL. Is that your view, Mr. Wallison, that the IRS had no statutory authority to grant tax exemption to private schools that discriminate based upon one's race or color?

Mr. WALLISON. It is my view, yes, sir.

Mr. RANGEL. How long has that been your view, counselor?

Mr. WALLISON. I began my analysis of this early in December of 1981. I think my initial view was, after reading the briefs, and the initial drafts of the Justice Department's brief, that the IRS did have the authority.

Mr. RANGEL. You have written extensive briefs supporting that argument, sending them to Secretary Regan and to Mr. McNamar, is that correct?

Mr. WALLISON. I would not say extensive briefs. I think you have a three-page memo there, Congressman. What I said, if you take a look at the date of that memo, my initial memorandum to the Secretary, is that I thought the Internal Revenue Service's position should be supported.

Mr. RANGEL. Exactly. Who told you to change your legal position?

Mr. WALLISON. Obviously no one told me to change my legal position. I changed my position as I began to read further into these questions and began to think about the implications of the position that the Service was administering.

Mr. RANGEL. Did anyone discuss with you the Republican platform as relates to this case?

Mr. WALLISON. Yes, people have discussed with me the Republican platform.

Mr. RANGEL. Did Members of Congress discuss it with you?

Mr. WALLISON. No, sir.

Mr. RANGEL. Did you receive briefs or information from Congress that were in opposition to your original view of this?

Mr. WALLISON. I have had no contact with Members of Congress.

Mr. RANGEL. Did you discuss it with members of the White House?

Mr. WALLISON. Yes, I have met with Mr. Fielding, the President's counsel.

Mr. RANGEL. Did you discuss the political implications of your original legal position?

Mr. WALLISON. We discussed the political implications of a decision that we were thinking of making in this case and that is also covered in one of the memorandums.

Mr. RANGEL. I heard Mr. McNamar say at the Senate hearing that the decision to go this route without suggesting legislation was his and his alone, is that correct? That you made the decision, you bit the bullet, and you take the credit or whatever?

Mr. MCNAMAR. I don't think that was exactly what I said.

Mr. RANGEL. Who decided to reverse the previous policy established by counsel?

Mr. MCNAMAR. I made the initial decision which we subsequently reviewed, and in the following way which I think is quite——

Mr. RANGEL. I just want to know, the President said he made the decision. Now, who spoke with you first about this case? You were trying to get some answer out before the Supreme Court decided it. Who physically told you that the administration had a concern about this?

Mr. MCNAMAR. No one told me the administration had concern about this. I had heard about this case before. I had not read anything on it, was not involved in it. I received a phone call from Ed Schmults on the 8th of December, and he asked did I know anything about it?

I said that I knew there was a question concerning tax-exempt status of schools engaged in racial discrimination.

Mr. **RANGEL**. After you started getting all of these memos, somebody had to say let's get some data to show that they have not got the authority, is that not correct?

Mr. **McNAMAR**. That is incorrect.

Mr. **RANGEL**. Well, who told you——

Mr. **McNAMAR**. No one told me to do anything.

Mr. **RANGEL**. Who informed the President that the legal position that was taken by anyone or all four of you was the correct legal position?

I don't think——

Mr. **McNAMAR**. I don't know that. I had no conversations——

Mr. **RANGEL**. Somebody has the responsibility to advise the President before he makes a decision like this, and I would like to know, can you tell this committee who advised the President of the United States that the Internal Revenue had no legal authority to deny tax exemptions to private schools that discriminate based on color?

Mr. **McNAMAR**. As Mr. Wallison said, we went over to the White House on the 22d of December and met with Mr. Fielding, White House counsel, and indicated to him at that time that we were concerned about the position the Government had been taking for 11 years, and that because we wanted to sustain that position we were waiting for the briefs that were being prepared by the Solicitor's Department, that would support that position and that we would not make up our mind until we had read those briefs.

When those briefs were first given to us, a fairly lengthy brief which is part of the record I believe, I read that on, I think, the night of December 23, over the kitchen table, and by the time I finished reading it for an hour or so, I said that argument doesn't hang together. That argument is unsupportable. I am not convinced by it.

So in an effort to sustain the IRS's position, we went back to the Solicitor's office at the Justice Department and said, "Give us a better brief, please. And give us one that we can support the IRS on."

Mr. **RANGEL**. Were these the same people——

Mr. **McNAMAR**. We had two tries in fact in reading the best argument that the Government apparently could make——

Mr. **RANGEL**. In other words, they were going to write briefs until they wrote what was acceptable, isn't that correct?

Mr. **McNAMAR**. That is incorrect. That is incorrect.

Mr. **RANGEL**. When did you decide that you had the right brief? What date was that?

Mr. **McNAMAR**. I decided that we had had enough discussions and I had seen or read enough cases and seen enough information and talked it through and thought it through enough so that on about the 30th or 31st of December, I was convinced the Government was taking the wrong position in this case.

Mr. **RANGEL**. When did the administration make the legal decision that you were going to change 10 years of law and do what was right?

Mr. **McNAMAR**. We were under a court deadline to file on the 31st. We did not think we could get an extension of time. We subsequently decided at the suggestion of Mr. Schmults that we ought to be sure that we thoroughly reviewed the decision and had a written memorandum and to that end, we did petition the court for a 1-week extension on the 31st, and the decision was reviewed by tax people at the IRS, the IRS General Counsel and so on.

Mr. **Rangel**. January——

Mr. **McNamar**. The decision was finally announced on January the 8th.

Mr. **Rangel**. Fine. My last—not my last question, but in view of the kindness the Chair has shown, I understand from Mr. Schmults' testimony that at a meeting held on January 6 at the Attorney General's Office, attended by the Solicitor General's Office, Tax Division, Mr. Reynolds, and others, that that is when they determined that they were going to take this posture, that they all got together and decided it then; is that correct?

Mr. **Schmults**. Yes, that was a meeting made up, Mr. Rangel, solely of Justice Department officials. As my testimony says, that was the 2½-hour meeting at which all sides were argued before the Attorney General after he had read memoranda again presenting both sides of the issue.

Mr. **Rangel**. Then I have another memorandum indicating that in Mr. McNamar's office they had decided on January the 5th as to how they could control this from the press and how they were going to release it, is that correct?

Mr. **McNamar**. I assume that is the memorandum drafted by Ms. McLaughlin when she returned from New Year's vacation. I told her on the 4th of January that in my opinion we were not going to be able to continue the position of the Internal Revenue Service and it would be a major news item and would she figure out the right thing was to do, for example——

Mr. **Rangel**. To control the information?

Mr. **McNamar**. No, I didn't tell her to control the information. I asked her how do we get the story out so that people will understand what our rationale is?

Chairman **Rostenkowski**. Mr. Martin will inquire.

Mr. **Martin**. Thank you, Mr. Chairman.

First, if I may, I would like to request permission, Mr. Chairman, that the Deputy Attorney General Schmults be allowed to supplement in writing the statement he was making to the gentleman from New York about the written views of Mr. Olson within the Attorney General's Department, at the point at which he was interrupted and secondly, that Secretary McNamar who was interrupted while trying to answer the question regarding how he decided the position should be reversed also be allowed to elaborate on that, to the extent it is not already covered in his previous statement.

Chairman **Rostenkowski**. Is there objection?

Mr. **Stark**. Objection.

Chairman **Rostenkowski**. Objection is heard.

Mr. **Martin**. Thank you. Perhaps we can have further discussion and find out why. Let me just ask, Attorney General Schmults if he has anything further to say with regard to the views—written views of Mr. Olson?

Mr. **Schmults**. Yes, what I was going to say was that Mr. Olson was present at one or two of the discussions at which the legal issues involved in these cases were presented. He did have some concern about a point called legislative acquiescence, that is what were the actions of Congress after the 1970 decision of the Internal Revenue Service and did they show or could they be an indication of Congressional acquiescence in the position of the Internal Revenue Service.

Mr. Olson wrote a memorandum outlining some of the points that he had raised in those discussions. It was a very helpful memorandum. And, when we restated for the benefit of the Treasury our legal memorandum outlining our earlier advice to them, we addressed those points that Mr. Olson raised and they are in the memo that I have submitted for the record of these proceedings. I thank you for allowing me to complete my answer.

Mr. MARTIN. Thank you, sir. The same with regard to Secretary McNamar. Perhaps you were able to in subsequent discussion with the gentleman from New York expand upon how you decided your position should be reversed or not. Certainly I will allow you some of my time, since I have more, to answer that.

Mr. MCNAMAR. I think at this point I have said everything, unless the gentleman from New York has subsequent questions I would be delighted to answer.

Mr. MARTIN. I will certainly yield, after I have one more question. I will give the rest to the gentleman from New York.

One of our earlier witnesses made a suggestion that it would have been more prudent to allow the Supreme Court to go ahead and consider issues of religious discrimination, racial discrimination. I wondered what would be wrong with your going forward with the case, temporarily withholding the tax exemption from Bob Jones University and/or the Goldsboro Schools in order for the Supreme Court to reach its final determination; and related to that, why could you not go for it and present to the Supreme Court your determination to root out and punish racial discrimination as well as your reservation about the legal basis for doing so?

Mr. REYNOLDS. Congressman, that would certainly be our preference. We would like to do that. There is a problem and that is that when we reached the decision as a matter of law, the position that we would have to assert in the Supreme Court was the one that was indicated on January the 8th. That left the case in a posture where there were no longer two litigants that were involved in a controversy because we would then be taking the side on the legal issue that was similar to the side that was being advanced by Bob Jones University and Goldsboro Schools, as far as the statutory authority question. The court has said any number of times that it will not render advisory opinions where there is no case or controversy before it. And it is therefore, to us, unlikely, indeed we don't see any way in which the case could be put into the court where you don't have the parties that are litigating or arguing the legal issue on different sides. You do need to have what is called a case or controversy in the court, and we—when we got to the point where we did in our legal analysis, it was not possible for us, then, to go back to the court and to ask the court to render an advisory opinion where there was no adversary party on the issue that was before the court.

Mr. **Martin**. It is not possible for you to argue what you regard to be valid points on both sides? With regard to racial discrimination and with regard to the case law that the gentleman from New York was discussing and the other with regard to the legal basis?

Mr. **Reynolds**. The problem with that is that the issue that is in the Court is the issue on statutory authority. That is the one the Court took to hear. And in order to do what you are suggesting, we would have to take a position on that question which would be the same position that was being taken by the other litigants. That would not leave anybody on the other side of the issue to argue the other point.

In order for the Court to hear the case in a controversial setting, I guess that what the Court would have to do is to allow the NAACP—and I believe the NAACP has requested—allow it to intervene and argue the case on the other side. But that would then require, I think, in terms of our jurisprudence, that you ignore the fact that there are not two litigants in the Court that are in controversy and it would require the Court to render an advisory opinion. I think that is something the Supreme Court has indicated it will not do.

Mr. **Martin**. If this committee and the Congress were to elect to go forward with the recommendation that has been submitted on behalf of the administration, and that were enacted into law, then inasmuch as it is written to be retroactive back to the day this was first opened in 1970, would Bob Jones University and/or Goldsboro Schools be able as another witness suggested to collect a refund on back taxes or would they be right where they were before?

Mr. **Reynolds**. If the legislation is passed as it has been proposed with the backdating until 1970, then Bob Jones University and Goldsboro would not be able to collect for the back taxes.

Mr. **Martin**. Back or forward?

Mr. **Reynolds**. Back or forward.

Mr. **Martin**. What time I have I will yield to the gentleman from New York.

Mr. **Rangel**. I will wait until it is time, thank you.

Chairman **Rostenkowski**. Mr. Stark will inquire.

Mr. **Stark**. Thank you, Mr. Chairman. I would just say, as a nonlawyer, all I can conclude is that the administration has just traded away the 14th amendment to redeem a campaign pledge. That is what all of the testimony today, this whole briefing book says. If you just add up the score, it appears to me as a lay person that reputable legal scholars, constitutional experts, and a bipartisan panel of Commissioners, all are on one side of the issue which in effect says the documents in this book prove that there was no legal justification for the administration's decision to reverse the 10-year policy of the non-income-tax-exemption to schools that discriminate, as opposed to you four guys who are obviously not nonpartisan, and who are paid to support the administration.

I suppose that doesn't deal with your professional competence or your integrity, it deals with your loyalty as expected.

So, I am afraid that that is what the public sees and I believe it is the laymen's inference. Having said that——

Mr. **Schmults**. May I treat that as a question and answer?

Mr. **Stark.** I have a question for you, I will direct it to you. Mr. Reynolds, Mr. Schmults suggested that you yield to no man in your war on racial discrimination, and I presume that is correct.

Mr. **Reynolds.** That is correct.

Mr. **Stark.** Do you find the advocating of murder and kidnaping of blacks and Jews abhorrent?

Mr. **Reynolds.** Certainly.

Mr. **Stark.** In the Washington Post this morning, it was suggested that in the same discussion or among the same group who was discussing restoring tax exemptions to private schools that discriminate, there was some feeling that we ought to allow this National Alliance of Nazi's group to get a tax exemption or not, in effect, not support the appeal.

Were you one of the people, Mr. Reynolds, who felt that in fact the Government should not support the appeal?

Mr. **Reynolds.** My view, we did consider the *National Alliance* case. My view is that a denial of exemption would be appropriate and authorized as to National Alliance.

Mr. **Stark.** The Post story indicates that there were some members of the administration in the Justice Department or IRS, some professionals who advocated not supporting the appeal. Were you one of those people?

Mr. **Reynolds.** No, I was not.

Mr. **Stark.** Who was? Who did?

Mr. **Reynolds.** I do not know. I have not read the Post story this morning and I have no idea.

Mr. **Stark.** So as far as you know, there was no discussion in the Justice Department or IRS, among any of the Government lawyers, that we should no longer pursue supporting the appeal?

Mr. **Reynolds.** The only discussion I know of, Congressman, was the theory of that appeal and how it should proceed. Clearly, the view that I took and I believe that it is the view that is being recommended in that case, was that particular organization is not an educational organization as defined under the regulations and statute and therefore that it would not be entitled to exempt status.

Mr. **Stark.** There is statutory authority for denying exemption?

Mr. **Reynolds.** For denying an exemption to an institution that is not a bona fide educational institution.

Mr. **Stark.** I yield the balance of my time to Mr. Rangel.

Mr. **Rangel.** You would deny the tax exemption because the activity was illegal, is that correct?

Mr. **Reynolds.** Because it is not a bona fide educational institution.

Mr. **Rangel.** Suppose it was bona fide?

Mr. **Reynolds.** If it is a bona fide educational institution, you have kidnap and murder, there are other laws on the books that deal with those problems.

Mr. **Rangel.** So you would grant tax exemption?

Mr. **Reynolds.** I do not know from your hypothetical whether I would or wouldn't until you could spell out all of the facts or give me the hypothetical.

Mr. **Rangel.** So, if just as an aside, they advocate murder and kidnap?

Mr. **Reynolds**. A bona fide educational institution which on the side advocates murder and you are asking me whether I think 501C would require denial of exemptions for that alone. I do not believe it would require denial of exemption.

Mr. **Rangel**. It would have no authority to.

Mr. **Reynolds**. If on the side it is advocating that, I would say not.

Mr. **Rangel**. If it was the Klu Klux Klan and they had a school and you know the principles of the Klan and it is a bonafide, registered school, would the IRS have the authority to deny tax exemption?

Mr. **Reynolds**. The fact that it is state registered would not lead me to believe it is a bonafide educational institution.

Mr. **Rangel**. That they qualified as a bonafide——

Mr. **Reynolds**. If the hypothetical is that they qualify as a bonafide educational institution, Congress has written a law saying they are entitled to a tax-exempt status and then you deal with your other problems.

Mr. **Rangel**. And the fact that you know that racial discrimination under the Federal law is illegal, you accepted that——

Mr. **Reynolds**. I think racial discrimination is illegal.

Mr. **Rangel**. And you indicated that the IRS would not grant tax exemption to institutions involved in an illegal activity?

Mr. **Reynolds**. I think the statement is that with respect to charitable institutions that are engaged in violations of—activities and violations of criminal law, you do not grant the exemption.

Mr. **Rangel**. I said illegal. Did any of you testify that the IRS would not grant tax exemptions to institutions that have been involved in illegal activities?

Mr. **Reynolds**. If they are charitable institutions.

Mr. **McNamar**. I said it, yes. I was not talking about educational institutions but charitable institutions. It was certainly my intent, when I talked about illegal activities, to include the kind of criminally illegal activity you used in your hypothetical.

Mr. **Rangel**. "We will, pending such action, continue to support the Internal Revenue Service"—and it goes on—"to those organizations engaged in illegal activities."

Mr. **McNamar**. In charitable areas, you are quite correct, that is criminally illegal activity.

Mr. **Rangel**. But if a school is involved in a criminally illegal activity, as we know it, the authority cannot deny the tax exemption?

Mr. **McNamar**. I think that is what Mr. Reynolds said.

Mr. **Rangel**. Fine.

I yield.

Chairman **Rostenkowski**. Mr. Jacobs will inquire.

Mr. **Jacobs**. Mr. Chairman, I remember the novel, "The Invasion of the Body Snatchers." I perceive a grave danger has descended upon this country. Those who have the temerity to suggest that it is unlawful for the Internal Revenue Service to grant an exemption to the private schools that engage in racial discrimination have managed to fool all of the courts they have come through, they have managed to fool the Nixon administration, they have managed to fool the Ford administration, they have managed to fool the Carter administration, and according to the morning newspaper, even the majority leader of the U.S. Senate and the chairman of the Senate Finance Committee has come under their evil influence.

Yet, we have testimony that I have just heard by all of that captured body of opinion that this is not what the law of the land is, it is in error, and instead we are dealing here with administrative fiat against which this administration firmly stands now.

If this administration firmly stands against the administrative fiat, this administration has turned over a new leaf. For example, the draft registration law was firmly on the books, statutory language on the books of this administration when it came into office. Yet, by all reports, the President didn't like it. So, this administration decided it would not enforce that law. To the naked eye, that would look like administrative fiat.

Then the President changed his mind and the administration decided it would enforce the law after a certain period of time, but that is not administrative fiat.

Now, Mr. McNamar, you didn't quite answer the implied question of Mr. Gibbons. I am confident that if you abhor discrimination so much, you will not discriminate in the application of your newfound policy of rejecting administrative fiat or government by bureaucracy.

Therefore, what is your answer? When are you going to begin taxing social security benefits?

Mr. McNAMAR. I have to confess that I do not know——

Mr. JACOBS. Now that you know, when are you going to start taxing social security benefits?

Mr. PICKLE. Will the gentleman yield on that point? They ain't going to.

Mr. JACOBS. Mr. McNamar is Irish. He don't need any help.

You are not going to discriminate against black people by just rejecting administrative fiat where they are involved. You are going to say, when must I write my constitutents and say I am sorry, but this administration is going to start taxing their social security benefits.

Mr. McNAMAR. I don't think the administration in its tax policy or anywhere else has proposed that yet, so that question has not——

Mr. JACOBS. It has not reached you, about 22 feet from me.

Mr. McNAMAR. It didn't reach my desk coming up the normal channels.

Mr. JACOBS. We will let you use that as your desk for a moment. The question is, are you going to reject administrative fiat in the case of social security benefits and the taxation thereof?

Mr. McNAMAR. Not until I have read the legislative history and looked at the congressional intent, as best I can tell it, from whatever statutes that do or don't exist, committee reports, any court cases that may exist on this. I don't know whether there are any or not.

Mr. JACOBS. You are beginning to make me believe that maybe this policy of IRS started in the Nixon administration and through all of the rest of the administrations maybe is an administrative fiat after all.

Mr. **McNamar**. I would like to go back to your body snatchers example, if I may, because I can't remember whether you had referred to the Supreme Court being captured.

I would like to tell you what the Supreme Court said about *Green,* if I may.

Mr. **Jacobs**. About what?

Mr. **McNamar**. What the Supreme Court said about *Green* v. *Connally* because it specifically considered that case——

Mr. **Jacobs**. If I wanted to ask about the Supreme Court, I would have done so. I have one other question.

As I understand the testimony of somebody, there is an allegation made here that in the definition section applying to section 601, Civil Rights Act of 1964, it is specific by definition; that is to say, exemptions are not covered by the definition of 601 of the Civil Rights Act from 1964.

I believe that through some error, whoever wrote that up for you didn't know that that is section 602, not a definition of the section at all. It makes a reference back to 601 and merely enumerates some Government activities which must comply with 601 but there is nothing in the language to indicate that is exclusive.

As I understand the testimony that Mr. Schmults did not choose to read, a tax exemption is not Federal financial assistance. Do you agree with that, Mr. McNamar?

Mr. **McNamar**. I believe that is the view that has been determined by the Supreme Court.

Mr. **Reynolds**. That is our view. Certainly that is our view. I think the Supreme Court reached that question in connection with the State tax exemption question in——

Mr. **Jacobs**. Are you Mr. Reynolds?

Mr. **Reynolds**. Yes, I am.

Mr. **Jacobs**. I said Mr. McNamar, but now we are on you. It is your view that an exemption is not Federal financial assistance?

Mr. **Reynolds**. Absolutely.

Mr. **Jacobs**. Then why, sir, do you want to deny it?

Mr. **Reynolds**. I am not saying that I do want to.

Mr. **Jacobs**. You are advocating a statute that would deny it.

Mr. **Reynolds**. I certainly think the policy decision with regard to whether or not private schools that engage in racial discrimination should be denied tax exemption is one that I fully subscribe to.

Mr. **Jacobs**. Why? Why do you object to it?

Mr. **Reynolds**. I object to it because I think that it is a indirect benefit to the university. If you look at the law on Federal financial assistance, you will find under title 6 that that would not be sufficient to say that it is Federal funding. Unless you want to accept, sir, that——

Mr. **Jacobs**. Wait a minute. Wait. You say we said assistance, not funding. Assistance is the——

Mr. **Reynolds**. That is right, Federal funding.

Mr. **Jacobs**. You say it is a benefit but not of any assistance.

Mr. **Reynolds**. I say it is not assistance.

Mr. **Jacobs**. What kind of benefit is it, financial?

Mr. **Reynolds**. Unless you are going to say that a tax exemption is a government——

Mr. **Jacobs**. My time is expired. I just want——

Mr. REYNOLDS. The *Walz* v. *Commissioner*——

Mr. JACOBS. Mr. McNamar, or whoever butted in, I would just put in the record what my mother always told me, "Oh, what a tangled web we weave when first we practice to deceive."

Mr. SCHMULTS. Would it be possible to finish our answer, Mr. Chairman? This is a very difficult, sensitive subject. I think it is important and we are here today to provide information, thoughtful information to the committee. We ask that you permit us to finish our answers. This is not something we are making light of.

Chairman ROSTENKOWSKI. Mr. Schmults, I have a problem with the fact that I have to work with time constraints. If your answers are as long as they are, I have problems. We will try to accommodate you.

Mr. Downey will inquire.

Mr. DOWNEY. Thank you, Mr. Chairman.

Mr. Schmults, I want to explore with you the statutory construction of section 501(c)(3) and section 170 of the code. It is my understanding, sir, that your contention is, and other members of the panel, that the language should be read, and I use a disjunctive of the word charitable as a qualifier for each organization should be narrowly construed.

Mr. SCHMULTS. Clearly in the disjunctive. That is what the language of the statute says because the categories are separated by "ors." Our position is that "charitable" is not an umbrella term. There is nothing in the law that requires an educational institution to also be charitable, just as there is nothing in the law that requires that a charitable institution also be educational, yes, sir.

Mr. DOWNEY. Are you familiar at all with one of the briefs done by Lawrence G. Wallace and John Murphy, Assistant Attorney General, et cetera, on this question? I believe their brief was never filed and it was ultimately changed.

I want to read you a couple of passages because they mention a whole plethora of court decisions that seem to indicate that the question of charitable construction should be viewed in a much broader sense.

I just want you, for the record, to elaborate on this particular view, since it has been disputed clearly by the constitutional experts that came in earlier this morning, and by members of the Internal Revenue Service in prior administrations.

For instance, one of the cases, *Helvering,* the court emphasizes the charitable requirements by observing that Congress gives educational and other charitable objects * * * thus the fact that the statute speaks of "corporations," organized and operated exclusively for religious charitable, scientific testing, testing for public safety, for educational purposes does not, as the petition does in this case, Bob Jones and Goldsboro, mean that each one of those terms describes a mutually exclusive tax exempt category.

Instead, an organization is eligible for tax exempt status under the 501(c) only if its operations are charitable, of benefit to society as a whole.

That is later understood to be the finding in the *St. Louis Union Trust Company* v. *United States,* 1967 case, the *United States* v. *Proprieties of the Social Law Library,* once again the *Pennsylvania*

Company for Insurance of Lives v. *Helvering*, the *International Form Federation* v. *District of Unemployment Board.*

All of these cases seem to indicate that the word "charitable" should not be viewed in the disjunctive, but should be viewed in collective, to wit public policy purpose must be attached to qualify for tax exemption.

How do you come to a contrary conclusion than that of the brief prepared by members of this particular administration and all of these courts?

Mr. SCHMULTS. Those cases make the point that "charitable" itself should be construed in the common law sense, and indeed that is what the IRS itself did in its 1959 regulations. They really don't deal at all with the disjunctive nature of "charitable" versus "religious" versus "educational."

Indeed, at the very time that the IRS put out its 1959 regulations, broadening the definition, if you will, of "charitable" to its common law they defined "educational" as a very distinct and separate purpose that did not require any charitable concept.

Mr. DOWNEY. But doesn't the *Green* v. *Connally* case, as affirmed by the Supreme Court, also view this question that the charitable instruction should not be viewed in this context?

Mr. SCHMULTS. That did impart, if you will, the broad charitable umbrella over the enumerated purposes of 501(c). We disagree with what that Court said. When you say that case was affirmed by the Supreme Court, I think that there is a very basic misunderstanding that has been repeatedly cited here.

I would like to read the note from *Bob Jones University* v. *Simon.* There the Supreme Court said, "The question of whether a segregated private school qualifies under 501(c)(3) has not received plenary review in this Court, and we do not reach that question today."

Such schools have been held not to qualify for 501(c)(3), citing the *Connally* case and mentioning that the Court itself had affirmed summarily, but going on to say as a defendant in *Green,* the Service initially took the position that segregated private schools were entitled to tax exempt status under 501(c)(3), but it reversed its position while the case was on appeal in this Court.

Thus, the Court's affirmance in *Green* lacks the precedential weight of a case involving a truly adversary proceeding. The Supreme Court has made clear several times that it has not really addressed the question that we are addressing here today. It is a very important point.

Mr. DOWNEY. First of all, aside from the fact that that particular case was cited for approval, the Supreme Court, according to Professor Tribe on that point that you just made, was reserving for itself the right to possibly look at it again.

Is that not a fair interpretation of what the Supreme Court said?

Mr. SCHMULTS. The Supreme Court said that that question had not received plenary review by the Court.

Mr. DOWNEY. Why, then, would it be against public policy or against the interest of what the administration is attempting to do for *Bob Jones* to go to the Supreme Court, to have this decision resolved once and for all?

I cite to you the simplistic reading of the statute, meaning the view that you espoused, section 501(c)(3). Coming through in *Green* v. *Connally,* the Court held that this should be held against public policy because of a segregated school. Why not have this question finally judged on this point in the Supreme Court?

Mr. SCHMULTS. But somebody has to argue on the other side. We think this is not something that we just pull out of the air—whether we are going to do or not do something. The question is, What could we, on the basis of our research, do that was faithful to our obligation, under the law, to represent to the Supreme Court our view of the law when our analysis led us to conclude we could no longer argue before the Court that the IRS had authority, granted from Congress, to withhold tax exemptions in those cases?

Mr. DOWNEY. Based on all of those precedents that I read to you, you ignore that and said that this is not in our opinion?

Mr. SCHMULTS. What precedents did you read to me?

Mr. DOWNEY. *Trinidad* v. *Sagrada Orden, St. Louis Union Trust Company* v.—1967.

Mr. SCHMULTS. Those cases are not precedents on this issue.

Mr. DOWNEY. They are precedents for the fact that charitable construction should be broadly construed. I take it——

Mr. SCHMULTS. We don't disagree that charitable may be broadly construed, but we do disagree that charitable has to be imported in the definition of "educational." There is no authority for that.

Mr. DOWNEY. The point there is that charitable should be extended to also educational religious institutions. Put that aside for the moment. Why not take a look at the legislative history and 501(3)(c), section 9, when we decide in the Congress, both from the Senate and the House, that it was against public policy to allow social clubs to discriminate.

Are you prepared——

Mr. SCHMULTS. Why don't you do that here?

Mr. DOWNEY. Are you prepared to tell me that the law has been construed so that the Congress of the United States views with favor the fact that educational institutions should be allowed to discriminate?

Mr. SCHMULTS. It is mind boggling to me that the fact that Congress specifically enacted a law to do what you just said with private clubs but has not done so with educational institutions supports in any way the point you are assenting. That argues totally the other way.

Let me finish. There is no hint of any authority that Congress was thinking of educational institutions there, except one footnote in the committee reports merely mentions the Supreme Court affirmed, which is indeed itself misleading because it does not go on to cite the *Simon* case, indicating that the *Coit* v. *Green* case is of no precedential value.

Mr. DOWNEY. It is mind boggling to me, sir, that the Congress of the United States and House and Senate construed with the *Green* decision, which is in fact how they base that decision on the law so much differently than the Justice Department.

We were the ones that were interpreting the *Green* decision to construe that the Congress should not do that.

Mr. **Schmults**. If you were interpreting it why wasn't there more mention of it? The sponsors didn't mention those cases. There is no hint any place in the legislative history except in one footnote in each of the reports. It seems to me that is not much interpretation in affirmance of that position.

Mr. **Downey**. That is the present law. If you will read the legislative report you will find *Green* mentioned prominently in both.

Mr. **Schmults**. One footnote is the point.

Chairman **Rostenkowski**. Mr. Shannon will inquire.

Mr. **Shannon**. Thank you, Mr. Chairman.

Mr. Schmultz, on December 15 you wrote a letter to Congressman Trent Lott:

"Dear Congressman Lott:

"The Attorney General and the Solicitor General have requested me to answer your letters of October 30 concerning the cases of *Goldsboro Christian Schools, Inc.* v. *United States,* No. 81-1, and *Bob Jones University* v. *United States,* No. 81-3, now pending in the Supreme Court. As you have noted, the Solicitor General is disqualified in these cases.

"When the status of private schools with reference to sections 170 and 501(c)(3) of the Internal Revenue Code came into question around 1970, Commissioner of Internal Revenue, Randolph Thrower, after extensive study of the relevant statutory and consitutional provisions, and after review at the highest levels of the Government, announced the position of the Internal Revenue Service thereafter set forth in Revenue Ruling 71-447, 1971-1972 Cumulative Bulletin 230.

"That position has been maintained by each of Commissioner Thrower's successors, including the current incumbent. The view of the Commissioner has been defended in litigation by the Department of Justice under the several Attorneys General then and thereafter in office.

"It has been approved by two United States Court of Appeals in three separate lawsuits. The Department has been unable to conclude that abandonment of the legal position in defense of the Commissioner's regulations in *Bob Jones* and *Goldsboro* would be expedient.

"We believe that the cases now pending in the Supreme Court will squarely present the substantive issues involved, and we look to the decision of that Court for authoritative answers to the questions presented. We shall, of course, be happy to keep you informed of any developments in the cases."

Now, why did you send that letter to Congressman Lott on December 15, 1981?

Mr. **Schmults**. At that date when I sent that letter, that was still the position of the Government. That was an accurate letter on the date I sent it. Our analysis——

Mr. **Shannon**. You just testified today that your concerns about that decision arose in early December 1981, that Mr. Reynolds came to you, that others in the Justice Department came to you, and said that they had some concerns, and you agree that you shared those concerns.

Mr. **Schmults**. That is correct.

Mr. SHANNON. Why did you send the letter if on December 15 the administration was reconsidering its position?

Mr. SCHMULTS. Because we were still representing the views of our client, the Treasury Department and the IRS, and there had been no other decisions made. We were still following the view that had been set out, I believe, in September—it is in my testimony someplace—at a meeting with Justice Department officials and the IRS. The decision at that meeting was to maintain the same position.

Mr. SHANNON. You knew that a decision change was possible, pending, that within a matter of weeks a final decision would have to be made on this. The brief had to be filed with the Supreme Court by December 31, 2 weeks later.

Mr. SCHMULTS. Right.

Mr. SHANNON. Wouldn't it have been more prudent to wait until you had made that decision to respond to Congressman Lott's letter, or wouldn't it have been more prudent to respond to him by saying it was under review and you would respond to him within a few weeks?

Mr. SCHMULTS. You know, as I look back on that, I think that probably would have been more prudent. Unfortunately, we seem to have an ability in the Justice Department to take a long while to respond to congressional mail.

Congressman Lott's letter came in October 30. An early draft of it I think came up sometime in November, which I didn't like, and so sent back.

When the final draft came up the letter was already 1½ months overdue. It still represented the position of the administration. It still represented the position of the Treasury Department. It was an accurate letter when I sent it and——

Mr. SHANNON. Your December 15 response was not a hasty and unreasoned response. It was something which had been kicking around in your office for 6 weeks, and on December 15, after thinking it over——

Mr. SCHMULTS. It had not been——

Mr. SHANNON. Looking at various versions of it you decided to respond by saying that Commissioner Thrower had substantial reasons for his decision and it was the position of the Government to support those decisions, let the Supreme Court make the ultimate decision. That was your position on December 15?

Mr. SCHMULTS. No, that is not right. It had not been "kicking around in my office for 6 weeks." Our procedure is that that went down to the Tax Division. It doesn't "kick around" any place. That is not the way we deal with congressional mail.

It went down to the Tax Division. They prepared a response. It took them some time to prepare a response.

Mr. SHANNON. Didn't you——

Mr. SCHMULTS. Will you let me finish and extend some courtesies?

Mr. SHANNON. Have you seen drafts of the letter?

Mr. SCHMULTS. No, I prepared—I did not like the first response. I sent the letter back for another response. It came up to me December 15. I mailed it out. It was accurate when I mailed it out.

The position had not been changed, and I thought the Congressman was entitled to a letter, and not further delay before getting a response to his letter.

Mr. SHANNON. Even knowing that that letter might be misleading him as to what the administration was doing to——

Mr. SCHMULTS. The letter was not misleading because I did not know that the administration was going to do anything else at that time. The letter to the Congressman reflected what was then the position.

Mr. SHANNON. Mr. Schmults, you have testified today that during that period of December 15 this whole area was under active consideration and discussion in the Justice Department.

Mr. SCHMULTS. We were looking at it very hard, but the effort right through to the end of December was to see if the brief could be narrowed, to see if a principled position could be established in the court to authorize the IRS or have the IRS be authorized to deny tax exemptions to schools that discriminated on the basis of race, but not at the same time endorse or obtain a broader principle that would give the IRS authority to invoke its views of public policies on a whole variety of issues and deny tax exemptions.

Right almost through to the end of December our entire focus was to narrow the brief, to see if we could deny, continue to deny tax exemptions to schools that discriminated on the basis of race.

I think that is clearly set forth in my testimony and Mr. McNamar's testimony.

Mr. SHANNON. So it didn't even occur to you that there might be a major change of policy when you sent that letter on December 15?

Mr. SCHMULTS. I don't know, quite frankly, whether it occurred to me or not. What I do know is when I sent that letter out, I believed it was accurate, and I believe now in hindsight it was an accurate letter on the date I sent it out. I try to be as candid as I can with congressional inquiries, and that letter accurately reflected the position of the administration on December 15; indeed, I could have sent that out as much as 10 days after that and it would have reflected the views of the administration.

Mr. SHANNON. Then the change of policy happened virtually overnight. You could have sent this letter on December 25. By the 5th of January, the administration had a whole new policy. It happened, you wiped out 10 years of established civil rights law overnight.

Mr. SCHMULTS. No, that is not the way it happened, and the testimony makes that very clear. It was not overnight. We were seeking over some period of time——

Mr. SHANNON. When did you come to believe that the 1970 decision of Mr. Thrower was not really based on substantial legal research as you say in your September 15 letter, it was based on political expendiency as you said in your testimony today.

What led you to come to that conclusion?

Mr. SCHMULTS. I suppose it was sometime the end of December on the basis of the memorandum that I received from Mr. Reynolds and that we sent to the Treasury Department.

The real decision, the definitive decision, if you will, at the Justice Department, was in fact made, even though we had certainly given indications earlier to the Treasury Department that that was the view that we were leaning toward, occurred at a long 2½-hour meeting with the Attorney General on January 6, 1982, at which the positions that were cited earlier and reflected in the draft brief prepared by the Solicitor General's Office and the view reflected in the memo that was prepared under Mr. Reynolds' direction were really argued and debated for 2½ hours before the Attorney General of the United States.

Mr. SHANNON. I have read that Reynolds' memorandum and I didn't see any reference to what motivated the administration in 1970. I didn't see any evidence that would indicate that politics motivated Commissioner Thrower in 1970.

Mr. SCHMULTS. I didn't say anything about Commissioner Thrower.

Mr. SHANNON. The question was about Commissioner Thrower.

Mr. SCHMULTS. What question?

Mr. SHANNON. Your testimony this morning says, "When confronted with the identical politically explosive issue in 1970, the Nixon administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but legally unjustified."

That is completely opposite.

Mr. SCHMULTS. That is not in my testimony today. That was misconstrued in my testimony before the Senate. I do not have that Senate——

Mr. SHANNON. That is Senate Finance Committee testimony.

Mr. SCHMULTS. It is not in the testimony I gave today.

Mr. SHANNON. Was that mistaken?

Mr. SCHMULTS. No, that was accurate but it was misconstrued in some place.

Mr. SHANNON. Let's refer to the Senate Finance testimony.

Mr. SCHMULTS. Refer to the testimony on page 21 today since that is my testimony——

Mr. SHANNON. Do you stand by the testimony you delivered?

Mr. SCHMULTS. Yes, I stand by the testimony.

Mr. SHANNON. Let's use that.

"When confronted with the identical political explosive issue in 1970, the Nixon Administration succumbed to the pressure of public opinion and allowed the IRS to proceed down a path that was politically palatable but politically unjustified."

Between December 15 when you sent this letter to Trent Lott and the day you delivered this testimony, Monday of this week, what led you to come to that conclusion that you had been wrong on December 15, it wasn't justified by the law in 1970 but that it was motivated by pure politics?

What led you to come to that conclusion?

Mr. SCHMULTS. The decision that was made to change the construction that was given to section 501(c)(3) was not made at the Internal Revenue Service or the Treasury Department; it was made at the White House. It was contrary to all the prior years——

Mr. SHANNON. What led you to conclude that? Why did you make that judgment? How did you come to the conclusion that it was made at the White House?

Mr. SCHMULTS. Well, that is what I have——

Mr. SHANNON. Did somebody tell you that?

Mr. SCHMULTS. Yes, I have been told that.

Mr. SHANNON. Who told you?

Mr. SCHMULTS. Some of the information that we have at the Justice Department reveals that.

Mr. SHANNON. What information?

Mr. SCHMULTS. Memoranda.

Mr. SHANNON. From whom?

Mr. SCHMULTS. From the Chief Counsel to the Assistant Attorney General for the Tax Division.

Mr. SHANNON. Who is that?

Mr. SCHMULTS. At that time I guess it was Martin Worthy and Assistant Attorney General Johnny Walters was head of the Tax Division.

Mr. SHANNON. Do we have those memoranda?

Mr. SCHMULTS. I don't know whether you do or not.

Mr. SHANNON. Will you make them available to us?

Mr. SCHMULTS. We will certainly consider that.

Mr. SHANNON. Thank you, Mr. Schmults.

Chairman ROSTENKOWSKI. Mr. Matsui will inquire.

Mr. MATSUI. Thank you, Mr. Chairman.

Gentlemen, I think the point that many of us are trying to make is that you represent probably the two most important and powerful divisions within the Federal Government—the Judiciary and the Internal Revenue Service of the Treasury Department.

What we are attempting to determine is whether you acted in a fair way and whether you actually tried to uphold law.

Although I do have some tremendous problems with the substantive issues under discussion, the inquiry we want to pursue is how you arrived at your particular decision.

If it was based on a legal analysis, then, of course, we will have to then take issue with you from a substantive point of view, but we won't be able to do it from a political perspective view.

Mr. McNamar, I would like to ask you some questions, because it seems that based on your prior comments and testimony, you made the ultimate decision as to how the administration was to proceed on this question.

It is my understanding that in your decisionmaking process, you met with Mr. Fielding at the White House on the 22d of December. Was that by yourself or was that with others?

Mr. MCNAMAR. No, Mr. Wallison and I went over. We had looked at the *Jones* case. I asked Mr. Wallison either on the 20th or 21st to try to draft a quick memo so we would have something to give to Mr. Fielding. That is the memo dated December 22 which I think the committee has.

Mr. MATSUI. Right.

Now, at that time you were in support of the prior position, the one that was promulgated initially by the Nixon administration; is that not correct?

Mr. MCNAMAR. I wasn't in support of or against any position. I was trying to educate myself at that point.

Mr. MATSUI. You received the December 22 interoffice memo from Mr. Wallison and did you ultimately assume it went up to Secretary Regan? Is this correct?

Mr. McNAMAR. I presume it did. I really don't know.

Mr. MATSUI. Your signature is on it and so is Mr. Wallison's. Basically in that document it appears that there is support for the original position. In fact, Mr. Wallison states in here, "Indeed, it does not seem unreasonable that an organization which discriminates on the basis of race is not charitable in the broadest sense, and, therefore, should not be entitled to the benefits of the tax exemption."

Then he goes on to say, "However * * *" and I won't quote it as it is a rather lengthy paragraph. Basically, he is concerned that the courts may overconstrue the situation, and cause problems for all religious organizations, such as the Catholic Church although it is not specifically mentioned.

Then he goes on to say, "However, the court will probably give a very narrow construction of this case because there is an admission of racial discrimination and the case is unique to some extent and there is no problem of proof."

Then he goes on to say that it would be actually very good if the Supreme Court reviewed the *Goldsboro* and *Jones* cases, because eventually, a decision has to be made. You apparently approved this memorandum to Secretary Regan; is that correct?

Mr. McNAMAR. That is correct.

Mr. MATSUI. And you agreed apparently then with its analysis because I don't see any notations on the memo saying that you disagree with it.

Mr. McNAMAR. I would agree with all those comments and that was exactly my state of mind at the time.

Mr. MATSUI. Right, and then sometime on the 23d, that evening as you indicated in your testimony, you began to have some serious reservations about the present administration's position—that is the position espoused since the Nixon administration; is that correct?

Mr. McNAMAR. That is correct.

Mr. MATSUI. Was that based upon a memorandum—a draft brief that was circulated?

Mr. McNAMAR. What we did is we waited to read the draft brief that was to be filed in the Supreme Court by the Solicitor General's Office, because we knew that would be the most persuasive argument that could be made to support the continuation of the IRS policy. We received the brief late in the afternoon and I took it home that night; yes, sir.

Mr. MATSUI. And then later, because you were disenchanted with the legal arguments, you asked for further clarification or revision of the brief, and that you read on December 29 during the evening; is that correct?

Mr. McNAMAR. That is correct.

Mr. MATSUI. Is that pretty much the same document as the one that you had read on the 23d, because I don't have it? I understand you provided us with all documents pertaining to this matter, so it was probably a clean copy of the December 23 document; is that right?

Mr. McNAMAR. The December 23 document was a lengthy draft brief. I can't remember the exact length but the committee does have it, and then we asked them to go back and look at a number of points, particularly the common law charitable trust argument, and to brief that further, to try to strengthen that so that we could sustain the IRS's position. We asked the Solicitor's Office to do that and to take out some additional language that we didn't think was persuasive. We gave them no definitive instructions as to what to say or not to say.

As a matter of fact, they then came back with what was supposed to be a stronger brief to sustain the position the IRS had taken since 1970. We were trying to be persuaded.

Mr. MATSUI. That was apparently drafted around December 29, around the same time that evening you had decided to read it, and that is the final copy——

Mr. MCNAMAR. Yes, I got it either the 29th or 30th.

Mr. MATSUI. And that must be the copy of the brief that was going to be filed but was never filed; is that correct?

Mr. MCNAMAR. Both of them would have been filed, yes.

Mr. MATSUI. Then apparently sometime around December 31 you began to have some very, very strong reservation, at least according to your testimony; is that correct?

Mr. MCNAMAR. It was really before that. I had very strong reservations after I read the brief on the 23d.

Mr. MATSUI. Right.

Mr. MCNAMAR. At that point I went from being concerned that we had to take a hard look at the issue.

Mr. MATSUI. Right.

Mr. MCNAMAR. And had to be persuaded the position we had taken was correct.

Mr. MATSUI. Right. So from the 23d to the 29th or the 31st, you came from being skeptical to being opposed to the original Nixon administration position; is that correct?

Mr. MCNAMAR. I think that is accurate, yes.

Mr. MATSUI. Right.

Now it is my understanding that the memo by Mr. Wallison which Mr. Regan eventually got and the two briefs were obviously in support of the Nixon position. In fact, the last brief, as you indicated, was very strongly in support of the Ford, Carter, and Nixon administration positions.

Mr. MCNAMAR. Yes.

Mr. MATSUI. Now, you indicated in examination by somebody that you changed your mind because you did some legal research, that you read some cases, and you had discussions with other people.

Do you read your own cases? I know you are a very important person, a very busy individual, and I find it hard to believe that you actually sit down in a law library and read cases because of the numerous demands on your time.

You are not telling me you read cases, do you?

Mr. MCNAMAR. Yes, sir; I am telling you I went back and I read the original cases on this one.

Mr. MATSUI. Could you tell me what cases that you read? You must have read quite a few, because there are a lot of citations in the December 29 document that was never filed.

How many did you read, can you tell me?

Mr. McNamar. I would guess somewhere between a half dozen and a dozen.

Mr. Matsui. Six or 12, somewhere in that neighborhood?

Mr. McNamar. Somewhere.

Mr. Matsui. Which ones were they? Was it the *Goldsboro* case over again?

Mr. McNamar. I read the district court and the circuit court of appeals decisions in the *Bob Jones* and *Goldsboro* cases; I looked at the Federal district court decision and the circuit court of appeals decision in *Green* v. *Connally*, the *Walsh* case, *Tank Truck*, the case of *Bob Jones University* v. *Simon*.

I looked at the case of *Wright* v. *Miller* and *Wright* v. *Regan*. I looked at the case of——

Mr. Matsui. You convince me you did an excellent job. Most of those cases, almost all of those cases support the Nixon administration position, so you must have spent a lot of time on the dissenting opinion; is that right?

Mr. McNamar. There are very strong dissenting opinions in a number of those cases. Those are split cases, particularly the circuit cases, with lengthy dissents.

Mr. Matsui. So it was the dissenting opinions that really were the critical factors to make you change your mind, because——

Mr. McNamar. No.

Mr. Matsui. There were other memorandums then, apparently, that you have seen from the 22d, 23d, 29th, and 31st that were provided to you besides those cases? You did mention memoranda that you had read.

Mr. McNamar. We had a number of discussions which I think are laid out in the chronology that has been provided. A large number of phone conversations, meetings in my office, at the Justice Department, and so on. A large part of the decisionmaking process was involved in that, that talking through the cases and looking at the cases and arguing about the meaning of different paragraphs.

Mr. Matsui. So, in other words, you didn't rely upon any written memoranda?

Mr. McNamar. There was a written memorandum which was requested from the Justice Department, and I have got to look back, it is in my testimony, as to when it came over.

Mr. Matsui. I would like to know which memorandum that is because you see the only memorandum we have to support the position that you now take is a memorandum that was on the 8th of December from Caroline Kuhl. It is the memorandum in which she transmits to you, and I believe Ken Starr, the position paper of the Republican National Committee. It wasn't until January 5 that Caroline Kuhl actually wrote a written opinion regarding this matter.

Mr. McNamar. I don't know who she is.

Mr. Matsui. She is in the Justice Department?

Mr. McNamar. I don't know that memorandum that you are referring to. At the conclusion of this process, when I thought we were going to have to file on the 31st and found we would be able to get an extension, Mr. Schmults and I concluded that we try to reduce our discussions to writing and have a memorandum ahead of time.

That memorandum came over from the Justice Department around the 4th or 5th.

Mr. MATSUI. So you didn't read any memoranda from Mr. Wallison besides the one you received, or anyone else in Treasury, upholding your current position prior to the 31st when you actually made your decision?

Mr. MCNAMAR. There were some memorandums that came over from the IRS, I believe.

Mr. MATSUI. I don't have them in the file and I understand that you sent us everything, right?

Mr. MCNAMAR. You have everything that is in my file.

Mr. PICKLE [presiding]. The time of the gentleman has expired.

Mr. MATSUI. Can I have 2 more minutes?

Mr. PICKLE. The time of the gentleman has expired. We will come back to the gentleman.

Mr. Ford.

Mr. FORD. Thank you, Mr. Chairman.

Mr. Reynolds, in the testimony given by the Deputy Attorney General, I think on page 5, mentioned in early December 1981, Mr. Reynolds and others in the department reviewed the Tax Division draft, and it said, "Mr. Reynolds, the issue was particularly troublesome and the chief law enforcement official of the administration in the area of civil rights recognized fully the implications that the determination of the IRS had been acting without a sufficient legal basis."

It goes on over on page 6, you make reference again to the concern of Mr. Reynolds and others in the department over the fourth circuit's decisions. And on page 9, he mentioned you once more, about "Mr. Reynolds remained unpersuaded by the legal argument advanced."

Mr. Reynolds, how many employees are there in the Civil Rights Division of the Justice Department?

Mr. REYNOLDS. I think about 380.

Mr. FORD. About 380. How many of the 380 are a part of the legal staff as lawyers that work for the Justice Department?

Mr. REYNOLDS. About 170, I believe.

Mr. FORD. About 170. I read in yesterday's paper, in the Washington Post, which said, "More than half of the lawyers in the Justice Civil Rights Divsion have signed a letter protesting the role of their boss in the Reagan administration's decision to restore the tax exemptions to private schools that dioscriminate."

It goes on, and the sources said that the letter was signed by more than 200 employees of the division, half of them lawyers, and there are about 170 attorneys in the division, according to this article, and you have indicated that as well.

The letter says, "Giving tax exemptions to racially discriminatory schools violates existing Federal civil rights law as expressed in the Constitution, acts of Congress, Federal court interpretations thereof."

Mr. Reynolds, during this process with all of the memos and the conversations that went on within the Department, were you ever in contact with any of those lawyers who worked for the Civil

Rights Division of the Justice Department that had been working with this issue, no doubt, for the past decade, that had been directly or indirectly involved with this particular issue? Were you ever in contact with any of them? If so, when?

Mr. **Reynolds**. The appellate section of the division received the draft brief of the Tax Division and the draft brief of the Solicitor General's Office. They agreed with the position in the Solicitor General's draft brief. I disagreed with that position on the basis of my analysis of it.

Mr. **Ford**. I mean, were you talking with or communicating at all with any of the others who sent this letter to you?

Mr. **Reynolds**. Basically, at that time, I was dealing with the Solicitor General's Office since that is where the case was and that is where the drafting was being done at that time with respect to the position of the Government in the Supreme Court.

Mr. **Ford**. But the Deputy Attorney General was in contact with the head of the Civil Rights Division. I mean, you were a part of those sessions and you were making decisions with them as it relates to this issue that is before us today?

Mr. **Reynolds**. That is correct.

Mr. **Ford**. I was wondering as to all of the signatures. To me, it is clear that they had no participation, nor did they communicate with you in making decisions for the Justice Department as it relates to your department within that agency.

Mr. **Reynolds**. As I say, the only involvement they had was in reviewing the Solicitor General's draft brief and the appellate section did that and indicated its agreement with that position.

Mr. **Ford**. Mr. Chairman, I have one final question, maybe to the Deputy Attorney General.

On page 3, once again, you assert that the law on the issue of whether a racially discriminatory private school was qualified for a tax exemption was unclear, enough that four Justices of the Supreme Court had agreed to review the cases of *Jones* and *Goldsboro,* and I guess you used these two cases as evidence that the law was unclear, and that was the purpose of the four members of the Supreme Court to review this particular matter.

I am concerned at this point whether the important question to be resolved was not whether or not the IRS was correct in invoking the public policy in denying the exemption, or was it primarily on the religious issue?

Mr. **Schmults**. Of course, one doesn't really know that. My statement says, "While much has been written in the past few weeks about how clear the law is on this point, the fact remains that the very reason for addressing the question was because the issue is before the Court, so at least four members of the Court considered the question sufficiently unsettled to warrant Suprme Court review."

You are absolutely right. There were some constitutional issues also being raised, and one doesn't know, of course, precisely on which issue each justice was persuaded to vote to grant certiorari.

Mr. **Ford**. Do you think they were referring to the IRS issue as the major factor in their review of the issue?

Mr. **Schmults**. There were three Justices in the *Prince Edward* case dissenting who clearly voiced skepticism as to the power of the

IRS to employ Federal public policy to deny tax exemptions on the basis of race. The *Prince Edward* case is a 1981 case, so I think we take some indication from that that the justices that were voting in *Bob Jones* and *Goldsboro* certainly considered that issue one that they wanted to address, particularly in view of the note in the *Simon* case. This was an issue that had not received plenary review in the Supreme Court. So I think there is more than adequate basis for the statement on page 3 of my testimony.

Mr. PICKLE. The time of the gentleman has expired. The gentleman from Georgia, Mr. Jenkins, may inquire.

Mr. FORD. Mr. Chairman, first, will we have time to come back?

Mr. PICKLE. Yes.

Mr. JENKINS. Thank you, Mr. Chairman.

I believe there are some real difficulties and problems yet unresolved. There are conflicts, or potential conflicts, between the first and the fifth amendment rights of people or groups. But I am a little bit confused as to the scenario. We could have reached some of those issues, I assume, if we had been permitted to let those two cases, *Bob Jones* and *Goldboro,* go on to the Supreme Court for a decision.

Now, as I understand the situation, those institutions or others in a similar circumstance will have to commence the litigation all over again; is that right?

Mr. REYNOLDS. Certainly as to those issues, that is right. In the case that was in the Supreme Court, we have suggested that that is now moot. There are other cases. The *Green* case is still in litigation. There are some Tax Court cases where I think that the issue could come up through those cases to the Supreme Court, so I am not sure we are saying by starting all over again that it would be in a case that has not yet been brought. It would be possible for the issue to get to the court in one of the other cases.

Mr. JENKINS. What is the status of the other private schools who are making application for tax-exempt status now?

Mr. MCNAMAR. None of those applications are being acted on.

Mr. JENKINS. Why?

Mr. MCNAMAR. Because we have the legislation pending here in the Congress, and we have made a decision not to go forward with those.

Mr. JENKINS. Isn't that a denial? You have taken a position that the Internal Revenue Service cannot deny tax-exempt status to these schools.

Mr. MCNAMAR. What we are doing, Mr. Jenkins, is we have made that determination pending the Supreme Court resolution of the case. As you know, the Supreme Court has not yet said the case is moot, and we expect the Congress to produce the legislation very quickly.

Mr. JENKINS. If there is in fact an application and the administration has made a determination that IRS cannot deny that application, can you arbitrarily take that position?

Mr. MCNAMAR. If the Congress did not act on our legislation, we would have to grant those; that is correct.

Mr. JENKINS. So your position is that if the Congress does not act on this legislation——

Mr. MCNAMAR. Ultimately, that is right.

Mr. Jenkins [continuing]. That you will then grant the tax-exempt status?

Mr. McNamar. Yes, sir.

Mr. Jenkins. To all of the applications pending.

All right, let me ask you this. Do you take the position that it is now national policy that race discrimination is invalid, illegal?

Mr. McNamar. I don't think there is any question that it is national policy to prohibit any type of discrimination based on race, although congressional failure to act in this regard I suppose would raise some question.

Mr. Jenkins. You state in the legislation that "We believe that a retroactive effective date is essential to preserve the national policy of denying tax-exempt status to schools that racially discriminate." Is this retroactivity constitutional?

If you are going to grant the tax exemption, then it sounds to me like it is legal. I just don't follow the reasoning. It is national policy not to discriminate?

Mr. McNamar. That is correct.

Mr. Jenkins. But in the absence of any statutory language, you are saying that the IRS does not have the authority?

Mr. McNamar. That is correct.

Mr. Jenkins. Would that be true in any decision by Internal Revenue if there is not specific legislative authority, even though there may be a national policy the other way?

Mr. McNamar. I believe that is correct.

Mr. Jenkins. Thank you.

Mr. Rangel [presiding]. Mr. Anthony.

Mr. Anthony. Thank you, Mr. Chairman. I guess after sitting here for 6 hours and 20 minutes and hearing various opinions, I have heard very few people who could be marked down in the undecided column. I guess I need to ask the question of this panel. Are you willing now to confess error and say that you blew it?

Mr. McNamar. No.

Mr. Reynolds. I think that the decision we made we still believe was the legally correct decision and was the position that we had to take in the circumstances of the situation.

Mr. Anthony. The other two panelists?

Mr. Schmults. Yes, we all agree with that.

Mr. Wallison. I agree with that.

Mr. Anthony. You agree that the research that was done between December 15 and the decisionmaking during that process and announcement on January 8 is the one that you are willing to stand pat on and, well, not refuse to but at least tell your detractors that you didn't blow it, you are not willing to confess error, you are not going to confess error.

Then my next question would be to panelists, are you willing to let the Supreme Court hear the *Jones* and *Goldsboro* cases? Are you willing to find any legal authority upon which the Supreme Court could entertain the legal issue?

I have heard Mr. Reynolds testify about the fact that there is not an argument between two parties and therefore you don't have an argument before the Court. I haven't researched the area.

Is there any other legal doctrine upon which you could hang your hat and encourage the Court even in the face of the fact that you have changed your mind and asked the Supreme Court to decide the issue, because throughout all of your memoranda that you have provided the committee at one time or another you have all indicated that it is an area that is unsettled in the law and that the Supreme Court really is the best body to make that decision.

Mr. REYNOLDS. Congressman, I think that at the present time we have not been able to ascertain any way that we could initiate a request to the Court in the posture that the case is now in to have the Court consider it. The case is obviously up there on the suggestion of mootness that has been filed by the United States.

There have been motions filed in the Court by other groups seeking to replace the United States and to have the Court go forward with the case with them representing the other side of the issue. That, obviously, is a decision that the Court is going to have to make, but I do not see any way for the United States to ask the Court at this juncture to render an advisory opinion.

Mr. ANTHONY. To participate in that. So the Supreme Court still has the jurisdictional decision to make as to whether or not to consider it moot?

Mr. REYNOLDS. That is correct.

Mr. ANTHONY. And as some witnesses have indicated, they suggest that maybe we should not entertain legislation or move forward on legislation until at least the Court makes that determination. I think maybe Mr. McNamar made that comment. I hope I didn't misquote.

Mr. MCNAMAR. No, I didn't make that coment.

Mr. ANTHONY. Somebody did today.

Let me go back and follow up on what Mr. Jenkins said, because this is a point that I made earlier to the previous panel. I guess it is something that really does disturb me, because it makes it difficult for me to try to explain this complicated situation in a simplified manner to some constituents that may or may not be on either side.

Let's say that Bob Jones University decided to close down its present facilities, and move to the State of Mississippi and start the identical school with the same goals, principles and practices only in the State of Mississippi. Would you grant upon petition for application of a tax-exempt status that petition?

Mr. REYNOLDS. At the present time the IRS would not be able to grant an exemption, because there is an outstanding injunction in the *Green* case that pertains to all schools in Mississippi, and that injunction, Court order, would not permit us to act in Mississippi with respect to that application for a Mississippi school.

Mr. ANTHONY. But you are saying that that Court is wrong?

Mr. REYNOLDS. That is correct. We are saying it is wrong.

Mr. ANTHONY. The arguments today you are saying for us to disregard that decision, so why wouldn't you disregard it and go ahead and issue it?

Mr. REYNOLDS. Congressman, there are a lot of times——

Mr. ANTHONY. And then argue in your contempt citation that the Court was wrong and ask them to overturn it and hold you not in contempt of court.

Mr. REYNOLDS. There are a lot of times when the United States disagrees with a district court injunction, but we would not fly in the face of that and go into contempt. We still are supposed to abide by that outstanding injunction and the fact that we disagree with it does not give the United States license to just flagrantly flout the injunction.

Mr. ANTHONY. What if Bob Jones University suddenly decided to fold up camp and move to the State of Arkansas and do the identical same thing in the State of Arkansas and made a petition for tax-exempt status; what would you do with that?

Mr. REYNOLDS. I believe that in that situation that application at the present time would not be processed for a period of time until it is determined what action Congress is going to take, which is really consistent, as I understand it, with Treasury Department policy generally. When you have a piece of legislation pending on the Hill, and an application comes up for some kind of exempt status or what have you, the Treasury does hold those applications pending action by Congress for a period of time. Then, when Congress acts, instead of having to do it and undo it, they wait until then and then they go ahead and act on the application, and that is really the posture that your hypothetical Arkansas situation would fall into.

Mr. ANTHONY. Right.

As I understand it, Commissioner Thrower made that exact point and said even back there in his administration that they did that on occasion. I would like to go back to a comment from the professor from Harvard, Mr. Tribe. He challenged us to ask you this question.

He says that the statutory rule only allows the IRS a short delay, and that there is nothing in his opinion that allows the IRS to say that they will refuse to grant or refuse to act on a petition.

Are you characterizing your delay as a temporary delay until the Congress acts, and that if the Congress fails to act, then you will start acting on those petitions on a case-by-case basis, and probably follow what Mr. McNamar said and grant tax status?

Mr. MCNAMAR. Yes.

Mr. ANTHONY. Grant tax-exempt status although each one of you have professed an undying faith to not allowing racial discrimination in education facilities?

Mr. MCNAMAR. That is correct. It is inconceivable to us, despite what I read in the newspapers, that the Congress won't act on this legislation.

Mr. ANTHONY. So when you have a conflict of two principles, one principle saying you abhor racial discrimination in educational facilities, which comes in conflict with the principle that says the IRS should have some direction from Congress, you would let the principle win over that says you will wait for the Congress to respond?

Mr. REYNOLDS. Congressman, I think that really does put the whole controversy that we have been talking about in exactly the right posture.

Obviously in that case, we have an obligation and responsibility to comply with the law, and we do believe that in connection with that charge, and consistent with that charge, that we should not be taking action no matter how much we feel that Congress ought to have passed a law in that regard, until Congress does so.

Mr. Schmults said in his testimony, and I fully agree with it, that there is only one thing more important than combating racial discrimination, and that is that we be sure we combat it within the letter and spirit of the law, not that we try to wage that battle outside the letter and spirit of the law and to do it in disregard for the law.

Mr. **Anthony**. I would like to read a statement, then, that was contained in a document that was presented to this committee dated December 8, 1981. It was a memorandum for Secretary Regan. It was from the Commissioner of Internal Revenue, the second paragraph of a two-page document. It says:

"In 1970 Commissioner Thrower announced that IRS would no longer recognize discriminatory schools as tax exempt. Also in 1970 the Court permanently enjoined IRS to allow this position in Mississippi. Green was appealed to the Supreme Court by a third party and affirmed. In 1971 and 1975, procedures and rulings were established by IRS to carry out this position.

"The legal basis for this position is that exempt organizations must be charitable in the broad legal sense. This legal position has been maintained by the IRS since at least the 1920's, and has been expressly set forth in regulation since 1959."

So basically what we are doing in 1982 is not overruling something that started 10 years ago or 11 years ago, but basically what we are doing is overruling something that really has foundation in the IRS since 1920.

Chairman **Rostenkowski**. The time of the gentleman has expired.

Mr. **Reynolds**. Mr. Congressman, could I give a quick response to that? I think the response is found in the legal memorandum we have submitted to the committee, which actually demonstrates I think beyond question that that is absolutely wrong.

Chairman **Rostenkowski**. Mr. Brodhead will inquire.

Mr. **Brodhead**. Thank you, Mr. Chairman.

Mr. Chairman, it has been my privilege to serve as a Member of the U.S. Congress for some 8 years, and in that capacity to serve on three or four different committees, and to hear witnesses from three different administrations come before the Congress to attempt to defend positions that the administration has taken. Sometimes those positions are easy to defend, and sometimes they are difficult to defend.

In this case we have, as we have had before, a position which is difficult to defend, but I will say, Mr. Chairman, that in my view the performance by these witnesses today is without any question the shabbiest performance that I have ever witnessed before any congressional committee. It is absolutely unbelievable, the things that have been said here today.

Mr. Reynolds has testified here today in response to questions that if a bona fide educational institution were to espouse national socialism, were to espouse the kidnaping of blacks and Jews, that if it was in fact a bona fide educational institution, in his view the Government would be required to grant a tax exemption to that institution.

Mr. Schmults has attempted in his testimony, in response to questions, to cast doubt on the integrity of Commissioner Thrower and the people in the Nixon administration who first set forth the policy under question here today. He has made the statement in testimony before the Senate, and again today, that that decision was based on political expediency. He cites in support of that statement some memoranda that he has said exist. He will not submit those memoranda to this committee. He says he might consider reliance on those memoranda.

We had Commissioner Thrower here before this committee today, and he struck me and he struck the members of this committee as being a person of integrity. His testimony was very clear and unequivocal, that they thought that the policy they implemented was the law, they thought that it might cause them some problems to put it forth, but they put it forth because they believed it to be the law. Yet Mr. Schmults here today cast doubt on his integrity and the integrity of the people who made that decision, and said that they made that decision on the basis of political expediency.

In response to the questioning from my colleague, Mr. Jenkins of Georgia, Mr. McNamar says that they will not take action on pending applications for tax-exempt status despite the fact that in his view and the view of the other witnesses expressed here today, the law requires them to do so. Yet these administration officials are taking the position that they are not going to do it. They say that pending a decision by the Congress, they are not going to act on these applications, although it is their view that the applications need to be considered and either denied or approved.

I am just appalled, Mr. Chairman, by this testimony. It is just the shabbiest, the most incredibly unbelievable crap that I think has been brought before a congressional committee since I have served in Congress. I think the testimony that we have heard from the other witnesses today is very clear. Professor Sanders says the *Green* decision was affirmed by the Supreme Court in 1971, was endorsed by Congress in 1976, and has been followed by every Federal appellate court that has considered the issue.

Mr. Wallison in his memorandum of December 15 to Secretary Regan said, "My own view is that you should support the Commissioner's position fully. It is one thing for government affirmatively to interfere with the rights of free speech or freedom of religion. It is quite another for the Government to grant a tax exemption which encourages activities which clearly violate the most fundamental precepts of our society. Bob Jones University may continue to pursue its religious convictions but without tax exemption."

I think it is clear, Mr. Chairman, from the testimony of the law professors here this morning, that it is the administration here which has acted by executive fiat and attempted to change the law. This administration needs to be reminded that it is the province of the court, not the executive, to interpret the law. The courts have interpreted the law. The courts have spoken. The law is clear, and this administration simply would not follow it, and I am appalled.

Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. Mr. Pickle will inquire.

Mr. PICKLE. Thank you, Mr. Chairman.

Mr. Schmults. Mr. Chairman, do you not think that fairness dictates that we have at least a few minutes to respond to the gross distortions that Mr. Brodhead has just made here? I must say I have testified before congressional committees——

Mr. Conable. Mr. Chairman, I would urge that. We have had extremely intemperate language here, accusing these people of the worst of bad faith. It seems to me they have a right to respond.

Chairman Rostenkowski. The Chair would like very much to conclude this hearing by 5:30.

Mr. Schmults. I can complete my sentence in about 30 seconds, Mr. Chairman. I have been testifying before congressional committees for 8 years, and I must say I have never heard a more gross distortion of my testimony than that just made by Mr. Brodhead. I know Randolph Thrower. He is a man of integrity. He is a fine lawyer, and at no time have I ever cast any doubt on his integrity. If we are talking about shabbiness at these hearings, I must say Mr. Brodhead's attack on this panel at this time is about as shabby an attack as I have ever heard. And I turn to anybody else if they want to add to that.

Mr. McNamar. I would prefer to get on to the merits of the legislation we proposed.

Chairman Rostenkowski. Mr. Pickle will inquire.

Mr. Pickle. I am pleased, Mr. Chairman, to be recognized in this moment of pacification here.

Gentlemen, I am trying to ask myself is there any way to work out of this impasse? I was a Member of the Congress in 1964 when we passed the Civil Rights Act. President Johnson sent it up and we passed it and we established a clear national policy that we would not condone using the tax policy in any way that would practice discrimination, no matter what the pretense, and that has been the rule now for 18 years. That is as true today as it was 18 years ago when we passed that law. It is as true in my district of central Texas as it is in Mr. Rangel's district of New York. Yet because of a change, right out of the blue, in effect supported by your Department, we have a situation that has caused great consternation. You have thrown the biggest monkey wrench in the civil rights machine that we have seen in the past 18 years. There ought to be some way to work out of this.

My question to you is if the administration were to set aside its ruling and allow this to go to court, would you be agreeable to that?

Mr. McNamar. Could you elaborate on how they might do that, sir? I cannot give you an adequate answer.

Mr. Pickle. I am trying to find some way to move forward, to make a settlement of this case. Internal Revenue made the decision. Now you have said, in effect, that decision was wrong; you do not agree with it, and in effect say that IRS did not really have that right, that this ought to go ahead through the normal processes of the court. But at the same time you have made a motion to vacate and it cannot go to court.

It seems to me like you are being inconsistent. You agree that it ought not to be issued, and yet it will not be allowed to move forward. How do we work out of this?

Mr. McNAMAR. That was exactly the dilemma I found myself in, sir.

Mr. PICKLE. What do you recommend we do, then?

Mr. McNAMAR. I was going to have to take a position in the Supreme Court that I did not believe in, and I felt really would be a violation of the oath of office that I took, and I would have to do that in order to keep the case there, to keep the thing out of Congress and get it resolved, and it is a terrible outcome to have to make a principal decision and have it have the grossly unfortunate and reprehensible consequence, and I would welcome an opportunity to explore anything that would do that. We have settled on the one right way to fix it, which is for Congress to pass the legislation. I do not understand the congressional reluctance to consider legislation.

Mr. PICKLE. What would be your recommendation? The case cannot go forward, as I understand it. I am not an attorney, but it cannot go forward because you have filed a memorandum to vacate. We are at an impasse.

Mr. McNAMAR. No, I do not believe we are, sir. One, the Court has not yet acted. There have been intervenors who have asked permission to enter the case, the NAACP and others I believe have filed some briefs in the case, and the Court has those under consideration along with our motion, so the Court has not ruled yet on our request.

Second, there was a hearing today in the Federal district court in Washington, D.C. in the *Green* v. *Connally* matter. I do not know the results of that hearing yet. That may also indicate——

Mr. PICKLE. Are all of you saying that you are willing for the case to proceed before the Supreme Court? Will you cooperate to see that we have a hearing before the Supreme Court?

Mr. McNAMAR. If the Supreme Court wishes to hear the case, obviously that is the will of the Court.

Mr. PICKLE. Do you appear in the Court to argue the case?

Mr. McNAMAR. No, sir, I will not. It will be the Solicitor's office.

Mr. PICKLE. The Government?

Mr. McNAMAR. The Government would appear, if the Court asks us, and I presume they would.

Mr. PICKLE. Once again for my own clarity, you have said to the Internal Revenue Service that you do not agree with their decision. You have said that they do not have the right to grant tax exemption, and you think they ought to withdraw it?

Mr. McNAMAR. Yes, sir.

Mr. PICKLE. We will ask the next witness, if the administration were to set aside or withdraw the memorandum to vacate, that would be agreeable to you; is that correct?

Mr. McNAMAR. I am afraid I do not understand the question.

Mr. WALLISON. If I may try to clarify it to some degree. As some of the other witnesses have said here, our problem was that we could not file a brief arguing the theory that the Service was pursuing. Once we determined that that brief could not be filed, there was no controversy before the Court, Congressman, and with no controversy, we did not see that the Court had jurisdiction.

If the Court wishes to keep jurisdiction on the ground that there is an intervenor who would argue the other side of the case, then the case could be heard by the Court. We, I presume, would continue to take the position that we think is correct—that the Service does not have the legal authority to pursue the theory that they have pursued up to now—and the case could be argued before the Court. But it seems to us that the more effective way to do it is for Congress to grant the authority through the legislation proposed, and then the administration could appear against Bob Jones and Goldsboro and argue before the Supreme Court on that basis.

Mr. PICKLE. I appreciate your view, but that is your attitude, that is what you recommend that we do. We are saying, and we have for years and years, that we take it through the orderly process before the Court, and that may be what we will do. You are saying yes, it can be settled if you do it our way, that is your way, and I do not think the Congress needs to do that.

Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. Mr. Bailey will inquire.

Mr. BAILEY. Thank you very much, Mr. Chairman.

The brief that was submitted in the *Jones* case and the argument in that brief concerning congressional intent, apparently you disagree with that, is that a fair conclusion?

Mr. MCNAMAR. The original one?

Mr. BAILEY. Yes.

Mr. MCNAMAR. Prepared on the 23d, or the subsequent one on the 29th?

Mr. BAILEY. I do not know which one. I assume the one that I have here. It is numbers 181-3.

Mr. MCNAMAR. I am sorry, I do not have the numbers.

Mr. BAILEY. Let me ask you this. I have little doubt that before this battle is settled, that you people are going to lose. I think you are going to lose on an intellectual analysis of what you have done. I think you are going to come under a great deal of criticism. I think you are going to lose the battle. I am not worried about that. You are not going to succeed, I am convinced. I think you are dead wrong, by the way, and you may be sincere. I am not going to challenge you personally.

Here is what concerns me. The underlying issue here you know as prosecutors or as attorneys or whatever, we all know that a prosecutorial emphasis means something. You have at your disposal ideally speaking a criminal code let us say in a hypothetical situation that you want to enforce, or you have got in this case petitioners with rights, civil matters. Do you not have a duty?

I understand your rationale. You are saying that you do not agree with the law as you see it. Do you not think you had a duty to go forward, a commonsense duty to go forward and resolve this issue? Do you not think you did, whether you agreed with it or not? How do you respond to that? I guess you did not, but you know that you are raising questions of conflicts with the Congress, separation-of-power questions. You know all these others, these are very emotional and very important issues, but they are very broad ones down underneath.

Mr. MCNAMAR. I think that is exactly right.

Mr. BAILEY. No question about it.

Mr. **McNamar**. That is why we think the Congress has to solve them, the elected representatives of the people, rather than some GS-15 someplace.

Mr. **Bailey**. With all due respect, sir, I want to say to you, I mean this most respectfully, there is no way in the world that the U.S. Congress can conduct its business on a day-to-day or week-to-week or yearly basis and respond to confrontations of this kind. I think you know darn well what the will of this Congress is right now. With all due respect again, I think you goofed.

The best thing the President could do is have the courage to say that he made an error.

There is a much broader issue here. It is terribly arrogant to say that you are going to come to the U.S. Congress and tell us, when there is so much law, when the Court uses and quotes the *Green* case as I think they have and a number of cases as good law—perhaps they had not. Maybe they had not. Maybe there is an honest difference of opinion there.

The point is, however, we cannot legislate on issues like this every day, every week, and every year. There is no question at all, if you step back away from whatever encouraged you people to make this decision, that you would have to say that if the spirit and letter of the law that you referred to means anything to you as attorneys, and that Constitution means anything, that a fair, square way to deal with this issue was to proceed and litigate it and get it resolved.

It is the wrong way to make policy, and you are asking for very serious constitutional confrontations between the authority of the executive branch and the Congress, and I think you know what I am referring to, and I wish you would not do it. I would follow what Mr. Pickle has said. I would plead with you. If it means egg on the face, then it is egg on the face. I would plead with you not to proceed the way that you are. It is just wrong. It is not wise and it is not good policy, for a myriad of reasons beyond these cases, which you are going to lose on. You will lose on this position. You are not going to win. You are not going to succeed.

Will you respond? I hope I have not offended you. I did not mean to.

Mr. **McNamar**. You have not offended me in the least because you are quite proper in raising these concerns, but without addressing either of the——

Mr. **Bailey**. The brief, incidentally, was the 23d.

Mr. **McNamar**. That is the one I thought you meant. Without addressing the first amendment, or addressing the lack of a statutory basis which I think the Court would have ultimately found in this case, it seems to me that we do have a constitutional question here. Do we want to have a general delegation of authority from the Congress to the administrative agencies so that they can decide what the law is and apply it? If the Congress wants to have that, even aside from the constitutional considerations, if the Congress wants to have any enabling statute to that effect, that says the Treasury Department shall do whatever is right; then the problem we have is how do we interpret that.

Such legislation would mean that we are taking over legislative functions. We don't mean to do that. We don't want to do that.

Mr. **Bailey**. I am out of time. I think that is a rationalization. I am out of time.

Mr. **McNamar**. I think it is a consistent position, sir.

Chairman **Rostenkowski**. Mr. Pease will inquire.

Mr. **Pease**. First of all, I would like to see if I have something clear. You told me you are not processing any further applications for tax exemption. Is that correct?

Mr. **McNamar**. That is my understanding. You can get pertinent answers from Commissioner Egger.

Mr. **Pease**. You are saying you are doing that because you submitted legislation to Congress. How long are you willing to wait for Congress to act before you decide that you are going to go ahead and process those applications?

Mr. **McNamar**. Well, the maximum would be 270 days, because the individuals who file petitions have statutory rights that begin within 270 days, but we would not intend to wait that long. I am sorry that we have not brought this out for the members beforehand, because we have done you a disservice; we filed a paper in the Federal district court here with Judge Hart, saying that we would not do anything until he had his hearing today. He had asked us to do that.

We had indicated that we would. And so we have been in abeyance, pending the hearing. I am sorry; that should have been brought out earlier.

Mr. **Pease**. Thank you. Sometime before 270 days, you would go ahead and process those applications and presumably, other things being equal, approve those applications if the only barrier were a charge that the school is discriminating on racial grounds. Is that right?

Mr. **McNamar**. Yes, sir.

Mr. **Pease**. So that you would, before this year is half over, you would be in a posture of granting a tax exemption status to literally dozens of schools, if they apply, no matter how blatantly they discriminate on racial grounds. Is that right?

Mr. **McNamar**. I believe there is no question as to the racial discrimination of Bob Jones University. There is no question as to the facts.

Mr. **Pease**. I appreciate that your justification for that is the oft-quoted phase by Mr. Schmults and Mr. Reynolds to the dedication of the administration to following the law, no matter what the political or moral consequences might be. And to President Reagan's quote unalterable operation of racial discrimination in any form being overridden by his concern for the law.

I understand Mr. Reynolds said a few minutes ago that based on the commitment—excuse me, he said the only—only one thing is more important than combating racial discrimination; that is that we combat it within the spirit of the law. Is that a correct statement?

Mr. **Reynolds**. Within the letter and spirit of the law.

Mr. **Pease**. That is fine. I would like to address my question to Mr. Schmults because he is the senior representative from the Justice Department. Within the last few days it has been revealed that the Reagan administration plans to pay $71 million in debt owed by the Government of Poland and to use commercial banks and to do that, from CCC funds, despite the fact that the CCC regulations clearly require that the CCC seek a declaration of default and try to collect on the assets of the Government of Poland.

Yet, according to Mr. William Saffire, in the New York Times, the administration, maybe not Mr. Schmults personally, the administration urged, contrary, Poland did not want to suggest default. The administration urged all possible steps to get around the rules of the CCC. In a memo from the White House, "We urge that you explore all possible methods under the CCC charter either in order to circumvent the rules and suggested such things as issuance of temporary and emergency amendment to the CCC regulations with direct repurchase, et cetera."

Now, it says here in Mr. Saffire's column that an emergency regulation was secretly promulgated; however, it was felt that the arrangement had such a reek to it that the seven members of the CCC could not be trusted to enact it, so it was done without the approval of the CCC directors.

Now, in light of that, that does not seem to me to follow the law or certainly the spirit of the law. I wonder if you, as a spokesman for the administration and for the Justice Department, could comment on whether you don't think there is a slight bit of inconsistency in the administration's position between saying in a matter of racial discrimination we have to follow the law; if there is no clear guideline in the law, we can't do it.

In this case, clearly pending, the—perhaps the law, certainly the regulations of the CCC are for a political purpose?

Mr. SCHMULTS. I would like to be able to comment on that, but I am not familiar with that issue. I have not read Mr. Saffire's column. But I would be happy to provide an answer for the record. I am sorry I can't answer it. I am sure, or I trust, that the implications of your question are not so. But I think you should get an accurate answer for the record. I am just not able to answer that because I am not familiar with the facts.

Mr. PEASE. How soon might we get that?

Mr. SCHMULTS. Well, I will have to make an inquiry and get an answer for you, but I will do that so that it will be available for the record.

Mr. PEASE. Thank you very much.

Chairman ROSTENKOWSKI. Mr. Conable will inquire.

Mr. CONABLE. I want to make a comment about the need for temperance in this committee. I am very much upset by some of the things said in this hearing. The administration has come here and said Congress ought to look at this issue. Now apparently there is a good deal of disagreement about this.

Congress does not want to look at the issue. But that is no basis for abusing distinguished members of the Government who come up here and give us serious testimony. I just hope we won't have any repetition of that type of abuse again.

Chairman ROSTENKOWSKI. Mr. Martin will inquire.

Mr. MARTIN. Thank you very much, Mr. Chairman. I indicated earlier in my questioning that I would be and am generally sympathetic with the view that has also been expressed since then by both Mr. Pickle and Mr. Bailey, with the hope that there would be some way to proceed with the Supreme Court.

You have indicated that perhaps they will do that on their own. What you have done does not deny them opportunity to make that choice.

I want to make the point, because I think I was in agreement with you on that, that I am also concerned that unless there is a clear and direct way of doing that, it would put you in a worse burden than you are in now, for you to go forward, on the one hand, trying to maintain that you are trying to uphold something for which, on the other hand, you don't think that there is a legal basis. It seems to me that would subject you to all types of criticism from members of this and every other body for false pretenses.

I see there is quite a dilemma there. I yield.

Mr. **Bailey**. Would the gentleman yield on that point? I wonder whether there is any legal precedent for the Supreme Court to move sua sponte on an issue like this. I would like to ask that question on their own, first of all.

Second, in that spirit, I agree with what the gentleman has said, why don't you move forward and submit briefs that argue those contentions? Why not?

Mr. **Reynolds**. Well, the answer to your question is that what the United States has done is file a memorandum suggesting mootness. The Supreme Court can either agree with that suggestion of mootness or disagree with that suggestion of mootness. That is it——

Mr. **Bailey**. The burden is placed on you?

Mr. **Reynolds**. That is a decision for the Court to make. I suspect if the Court disagrees with the suggestion of mootness, it would then have to entertain motions or requests that are before it to have somebody else step into the case to make the argument that is on the other side.

Mr. **Bailey**. I am on the gentleman's time, but I would suggest that you are again asking for the Court to assume something in the interest of law enforcement, and your conservative view of it in this country; you may not want the Court to assume that kind of power.

You may be cutting off your nose to spite your face.

Mr. **Martin**. I thank the gentleman. There are a couple of other points I want to make. Earlier there was a good amount of fooling about the taxing on social security, and I suggest you don't take them too seriously on that. The Members know that social security benefits constitute a return of capital which is already taxed once, and therefore not subject to being taxed again, since there is no law directing you to do so.

Social security tax is not now deductible from taxable income, so income taxes are paid once on income that is withheld for social security. So it seems to me the burden of doubling the tax on social security is on those that want to do it, not on those that have no legal basis for doing so.

Next, the point occurred to me that it is always true that hindsight is better than foresight. Members have raised questions about who should confess their inconsistency of intent. In that line I would like to ask you about the Ashbrook rider to the Treasury appropriation, which is a limitation on appropriation, and ask you what view do you take with regard to this, as has been discussed by other witnesses?

What do you take with regard to the Ashbrook rider and to the four-fifths majority of Congress that voted for it, and myself, and four-fifths of the members of this committee, not counting those who voted both ways on different occasions and with regard to political influence?

Did that legislative action present any pressure and guidance on your deliberation on this matter?

Mr. WALLISON. Well, I would just like to start from the standpoint of the Treasury Department. We understood the impact of the Ashbrook rider to be that the Internal Revenue Service is not to revoke or deny tax exemptions based on any regulation that the Service may have put into place after August 22, 1978. Specifically, the last version of that rider said that the Service should not comply with any court order directing the Service to deny or revoke a tax exemption.

Of course, we have had some talk here before about constitutional confrontations, and from the standpoint of the Treasury Department, this, of course, is a rather distinct constitutional confrontation because we have been put in the position of either obeying a court order, or disobeying the will of Congress—and disobeying the will of Congress if we do obey a court order. We have referred that question to the Justice Department for its review, and we hope that before the time comes that we must respond one way or the other to any court order, we will have the judgment of the Justice Department on that question.

Mr. MARTIN. I would like to ask one other question about the specific legislation, Mr. McNamar. How would it treat a theological seminary?

Mr. MCNAMAR. It would be exempt.

Mr. MARTIN. It would be exempt. They would be entitled to a tax exemption?

Mr. MCNAMAR. Yes.

Mr. MARTIN. And contributions to a theological seminary would be deductible from income?

Mr. MCNAMAR. Yes.

Chairman ROSTENKOWSKI. The Chair would like an indication of how many members would like to ask questions of this panel. I would like to reduce the time for questioning to 3 minutes.

Mr. Rangel will inquire.

Mr. RANGEL. Did you check with the Chief of the Tax Division in order to get the brief upon which all of you changed your minds between Christmas and New Year?

Mr. SCHMULTS. Could you repeat that question, I didn't hear it.

Mr. RANGEL. I am trying to find out what legal briefs persuaded you, especially Mr. Wallison, who was most eloquent in supporting the position that the IRS used to have, and I have been unable to identify what legal papers you got ahold of.

I know you got ahold of some messages from the White House and you had some discussions and whatnot. Did you check with the Chief of the Tax Division? Did he write a brief for you?

Mr. SCHMULTS. Yes; the head of the Tax Division was excused because he had apparently had some prior relation to the matter in his private life, so the acting head of the Tax Division did work on the briefs and did contribute material that appeared in the brief prepared by the Solicitor General's Office.

It was in that brief. There was one document.

Mr. RANGEL. Could you please give the names because we are running out of time.

Mr. FORD. What about the Tax Counsel for IRS?

Mr. RANGEL. Did he do anything for the brief?

Mr. MCNAMAR. I misinformed the distinguished Congressman from California. He did not give me any memos in the period under question.

Mr. RANGEL. We know all of the memos we got were in the opposite position up until January 5. All of the eloquent memos on this question were written in opposition to your testimony today, with the exception of the one or two documents you got around January, right?

Mr. FORD. I can piggyback on that. I am concerned whether the Tax Division on the Counsel for the IRS, whether or not they concurred with your position here today? Do they concur with you?

Mr. MCNAMAR. On IRS, the IRS——

Mr. FORD. This is an important matter that we are discussing today and without the Counsel for the IRS here——

Mr. MCNAMAR. He is here. He will be testifying next, I believe.

Mr. FORD. Is he coming next?

Mr. MCNAMAR. Yes. Do you want me to give what I believe is his position?

Mr. FORD. You can give it.

Mr. MCNAMAR. He was anxious to see the case go forward because he did want a Supreme Court decision on it so that there would be a final resolution so there would be some certainty, a final binding case on the question of whether the theory that the IRS had been applying was valid or not.

He urged going forward with the case.

Mr. RANGEL. So did Mr. Egger, right?

Mr. MCNAMAR. Yes, same rationale.

Mr. FORD. If I can have my final question, it will take 30 seconds. This article is in the morning's paper about the spokesman for the Justice Department. Are you the spokesman they referred to, they didn't——

Mr. REYNOLDS. I don't know which article you are referring to?

Mr. FORD. It is an article that said that the lawyers who signed on to protest the policy of the Justice Department, you know, were all welcome to leave the Government.

I am wondering who the spokesperson was? Was that an invitation for them to leave?

Are they going——

Mr. REYNOLDS. I don't believe that is a quote from me. I believe you will find my statement was later on in the article.

Mr. FORD. I didn't say it was your statement. I said a spokesman——

Mr. REYNOLDS. I thought you asked if I was the spokesman? No, that was not mine. I believe my statement in regard to that matter is in the article.

Mr. **Ford**. How do you plan to handle the situation since they have been extended an invitation to leave the Government?

Mr. **Reynolds**. The way I plan to handle it is as it is reflected in the article. I have distributed to them our testimony and the legal memorandum and I would be more than happy to discuss it with any of them.

Mr. **Ford**. Discuss leaving?

Mr. **Reynolds**. Discuss the position.

Chairman **Rostenkowski**. Mr. Jacobs will inquire.

Mr. **Jacobs**. Mr. Chairman, I just want to read a couple of items into the record. I believe that Mr. Schmults' testimony on page 18, you will find the essential language. Sponsors in both House and Senate of the Ashbrook amendment maintain that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory practices.

I read you a quote from Representative Dornan, at the time of the—one of the Ashbrook amendments.

Let me emphasize that my amendment will not affect—this is the Dornan amendment's existing IRS rules, which IRS has used to revoke tax exemptions of white segregated academies under revenue ruling 71-447.

A quote from Ashbrook, "My amendment clearly indicates on its face that all of the regulation in existence as of August 22, 1978, would not be touched."

Then I give you a quote from Mr. Helms, Senate sponsor, "My amendment today does not change existing law containing revenue procedure, 7550 and thus it preserves the ability of the IRS to act against offending schools in a case—on a—in a case-by-case basis."

In answer to Mr. McNamar's failure to understand the bipartisan reluctance of Congress to pass new legislation, let me cite for you the highest authority in the land, President Reagan, who is said to believe deeply in the fundamental principle that if it ain't broke, don't fix it.

Mr. **McNamar**. I thought that was Burt Lance.

Mr. **Jacobs**. I am sorry?

Mr. **McNamar**. I thought that was Burt Lance, I am sorry. I think probably President Reagan agrees with it.

Mr. **Jacobs**. I have seen the President cited on many occasions that he has cited that, with approval, he is now the highest authority in the land, I guess.

Mr. **Schmults**. In our appendix, we include a number of statements by sponsors and others that support the statement made in my testimony. That has been submitted for the record.

Mr. **Jacobs**. In plain English, those amendments quarrel that IRS was determining discrimination. Neither of them quarreled with the fundamental authority, indeed, responsibility of the Service to deny such exemptions to institutions which, in fact, discriminated racially.

Would you agree with that?

Mr. **Schmults**. Yes, I would agree with that. But many statements made on the—or statements made by people who were supporting those amendments, in fact, show that they disagreed with what the IRS was doing and those statements are in the appendix to the statement we submitted.

Mr. Jacobs. You are aware in legislative procedures as well as in judicial procedures, there is a doctrine of overture dictum and that the statute speaks for itself, the appropriation rider speaks for itself.

Would you agree with that?

Mr. Schmults. We certainly are aware of that. We are not arguing that Ashbrook-Dornan indicates anything else.

Mr. Jacobs. You can even get good one-liners once in a while when we are passing laws.

Mr. Pickle. The time for the gentleman has expired. Now we have another witness to be heard and it is after 5 now. But we did say to some of the members that we would come back if you had additional questions.

Do any of the members have a 1-minute question? I will recognize Mr. Matsui.

Mr. Matsui. Yes, Mr. Chairman.

Mr. Pickle. I am sorry, the next gentleman will be Mr. Downey.

Mr. Downey. One of the points that concerns us here is that given the change of position on the part of our Government with respect to this case, that there has been or that there should be certainly adequate legal backup and memorandums of law and my understanding is that the legal justification for this policy change was not circulated until January 5 at a time when the decision to reverse policy was already made.

Now, Mr. Reynolds, I would like to ask you some questions about this. Who are Charles Cooper and Caroline Kuhl?

Mr. Reynolds. They are special assistants to me—Caroline Kuhl is special assistant to the Attorney General.

Mr. Downey. Is she the same person who forwarded to Mr. Stark a memo regarding the *Bob Jones* case with the Republican platform in it?

Is that the same woman?

Mr. Reynolds. I presume so. I only know one Caroline Kuhl.

Mr. Downey. K-u-h-l spelling?

Mr. Reynolds. That is correct.

Mr. Downey. How long have they been in their present positions, Mr. Reynolds?

Mr. Reynolds. I believe since sometime early in the summer of 1981, I thing that would be right.

Mr. Downey. Are special assistants political appointees or career merit appointees?

Mr. Reynolds. They are political appointees.

Mr. Downey. How old is Mr. Cooper?

Mr. Reynolds. I would——

Mr. Downey. Is he older than I am, do you think?

Mr. Reynolds. I don't know how old you are.

Mr. Downey. Early twenties, late twenties.

Mr. Reynolds. Early thirties.

Mr. Downey. How old is Ms. Kuhl?

Mr. Reynolds. I would say perhaps around the same age.

Mr. Downey. Is it customary for special assistants to provide the legal analysis for draft memorandum to the Supreme Court, Mr. Reynolds?

Mr. Reynolds. The Solicitor General's Office does the legal analysis for draft briefs to the Court and it did in this case.

Mr. Downey. Mr. Cooper and Mrs. Kuhl didn't circulate a draft memorandum policy to you or to anyone else?

Mr. Reynolds. They certainly did do it to me, that is right.

Mr. Downey. Did they circulate it to anybody else?

Mr. Reynolds. I believe that also went to the Attorney General and Mr. Schmults.

Mr. Downey. Did that memorandum form the basis, was it followed by the Solicitor General or anyone else, to your knowledge?

Mr. Reynolds. Well, the Solicitor General's Office took a different position and that is reflected in their brief.

Mr. Downey. My understanding is that the memo that Mr. Cooper and Ms. Kuhl wrote was circulated to Mr. Egger, to Mr. Gideon, to Mr. Chapoton and Mr. Wallison, is that correct?

Mr. Reynolds. A substantially similar memorandum, substantially the same one, that is correct.

Mr. Downey. Isn't it unusual for people who are so brief to the position that they hold to be circulating and doing this important work? Isn't this normally done by Tax Division attorneys to prepare such memorandum?

Mr. Reynolds. Not necessarily. I wouldn't say it was unusual.

Mr. Downey. Could you cite some other examples where people who have written policy or draft memorandums, in other circumstances, since it is not unusual?

Mr. Reynolds. Mr. Cooper has done an awful lot of legal memoranda for me and Ms. Kuhl has done the same, I think—on a lot of issues, there are a number of issues that we deal with that are highly controversial and they certainly participate in the legal analysis and legal research and contribute to it.

I don't think that there is anything that is unique or unusual with regard to the procedure.

Mr. Downey. Mr. Schmults, one final question. The Justice Department could very simply confess error before the Supreme Court on this matter as opposed to asking the Court to vacate.

Why didn't you just do that instead?

Mr. Schmults.

Mr. Schmults. Yes; let me confer for just a minute, if you will.

I think the reason was that in view of the change in the legal position and the advice we gave to the Department of the Treasury and the decision made by the Department of the Treasury that, in fact, our best judgment was that the case was moot.

If the Treasury decided that based on our advice, there was no basis in law for withholding the exemptions, there was, therefore, no case of controversy before the Supreme Court. Thus, the position that we thought we should take was to urge the Court that the case was moot.

Mr. Downey. If you had confessed error, wouldn't that have left you in a better position vis-a-vis *Bob Jones* and *Goldsboro,* where you have kind of an anomolous situation now where those two schools are going to be getting the tax exemption and other schools are going to be denied it when the evidence is apparently the same for both of them or for all of the schools to be denied.

Wouldn't that have been a far better and cleaner way to do it as opposed to—and you are also in the process of revoking revenue rulings. Wouldn't that have just obviated the need for giving Bob Jones and Goldsboro the tax-exempt status?

Mr. **Schmults**. You would have exactly the same result. I don't think that would have changed anything at all because you would have had the Government and the two schools taking the same position. There would have been no one arguing the other side. There would have been no case or controversy; there would not have been litigants before the court where one was being injured. I think if we had taken that course of action, the result would not have been any different at all.

Chairman **Rostenkowski**. Mr. Shannon will inquire.

Mr. **Shannon**. Thank you, Mr. Chairman.

Mr. Wallison, in a memo which you wrote to Secretary Regan on December 17 regarding another inquiry from Congressman Trent Lott concerning these matters, you concluded by saying to the Secretary, "To the extent possible, I think you should avoid suggesting to Congressman Lott that the issue will be raised in the White House. We may want to preserve the President's position of noninvolvement in this matter, whichever way it goes."

Are you aware of any White House involvement in this matter from the time the reconsidering of the position began in the beginning of December up until the time the decision was announced on December 8?

Mr. **Wallison**. Involvement, of course, is a very broad word.

Mr. **Shannon**. It is your word.

Mr. **Wallison**. That is right. I am aware that we brought to the White House attention the fact that that decision was going to be made at the Treasury and at the Justice Department, and informed them at that time that we would make that a decision, whatever it would be, and we would expect that they would give us some——

Mr. **Shannon**. Who in the White House?

Mr. **Wallison**. Fred Fielding, the President's counsel.

Mr. **Shannon**. Did Mr. Fielding ever discuss with you what that decision should be?

Mr. **Wallison**. No.

Mr. **Shannon**. Did he ever urge you to come down on a certain side of that?

Mr. **Wallison**. No; he did not.

Mr. **Shannon**. Are you aware of a notation from the President on his own log regarding a letter from Congressman Lott indicating some preference on the part of the President?

Mr. **Wallison**. Yes; I am.

Mr. **Shannon**. When did you become aware of that?

Mr. **Wallison**. It must have been about January 10 or 11.

Mr. **Shannon**. How about you, Mr. Schmults? Are you aware of that kind of notation?

Mr. **Schmults**. I certainly am. That piece of paper was attached to a letter that I received from Congressman Lott. It was dated December 21 and our time stamp in the Justice Department shows we received it the same day, December 21, so I am sure I saw it on that day.

Mr. **Shannon**. What did you do with it on that day, anything?

Mr. SCHMULTS. I didn't do anything with it on that day.

Mr. SHANNON. Do you normally receive copies of notations from the President of the United States indicating a preference on a policy issue on which you are making a decision?

Mr. SCHMULTS. No; that was, I must say, a very unusual communication.

Mr. SHANNON. You just did nothing? You didn't pick up the phone and call the White House and say, does the President have any feelings about this?

Mr. SCHMULTS. I did not.

Mr. SHANNON. Mr. Wallison, you didn't either?

Mr. WALLISON. No.

Mr. SHANNON. Did you discuss this issue with anybody in the White House other than Mr. Fielding?

Mr. WALLISON. I did not, no.

Mr. SHANNON. Mr. Schmults?

Mr. SCHMULTS. I had a brief conversation with Mr. Meese about it following another meeting on another issue.

Mr. SHANNON. What did he say?

Mr. SCHMULTS. I asked him if he were aware of the *Bob Jones* matter, and that it was under consideration. He said he was.

Mr. SHANNON. When was that?

Mr. SCHMULTS. I don't know when that was, but it would have been in the first week in January, before the announcement.

Mr. SHANNON. He didn't give any direction as to where he wanted the White House to go?

Mr. SCHMULTS. No, sir.

Mr. SHANNON. Mr. McNamar, did you have any discussions during this period with anybody in the White House?

Mr. MCNAMAR. Yes; I did. I called Fred Fielding approximately the 21st of December, sent Mr. Wallison to see him on the 22. I received no instructions or inferences of any type. I was then informed on the 28th of January by Secretary Regan, following the special situation meeting on the Polish situation, that Ed Meese wanted to be briefed. I called him at approximately 4 o'clock in the afternoon. I told him the implications of the case, gave a full briefing to his deputy, Ken Cribbs, the next day and that is all laid out in the testimony.

Mr. SHANNON. Nobody said to anybody in the White House, what the heck is the story? We have a copy of the President's log with a notation saying he is interested in this issue. What do you want us to do with this?

Mr. MCNAMAR. I saw it on the 13th of January.

Mr. SHANNON. Mr. Schmults, it never occurred to you to do that?

Mr. SCHMULTS. I don't believe I ever raised the fact that I got that letter from Lott. I must say that we get a lot of letters from Congressman Lott—they are very long letters arguing constitutional and other issues on a wide variety of cases.

Mr. SHANNON. But not many of them have President's notations.

Mr. SCHMULTS. That is right, but there are a lot of letters and I didn't raise that.

Mr. SHANNON. Who drafted the legislation which you sent to the Congress? Mr. Schmults, do you know?

Mr. SCHMULTS. Do I know?

Mr. SHANNON. Yes;

Mr. SCHMULTS. There were some lawyers from the Treasury Department and some lawyers from the Justice Department working with the White House Counsel, I believe.

Mr. SHANNON. Mr. McNamar?

Mr. MCNAMAR. That is correct.

Mr. SHANNON. Who?

Mr. MCNAMAR. Mr. Wallison, Mr. Chapoton.

Mr. SHANNON. Mr. Fielding?

Mr. MCNAMAR. Mr. Fielding.

Mr. SHANNON. Who else?

Mr. WALLISON. A lawyer in the White House——

Mr. SHANNON. Mr. Schmults, would you tell me when you first discussed this legislation with anybody in the government?

Mr. SCHMULTS. When I first discussed the legislation?

Mr. SHANNON. Yes; the date.

Mr. SCHMULTS. I think I first discussed the legislation when I became aware of the fact that some Justice Department lawyers, Mr. Reynolds and Mr. Olsen, I believe, were going to attend a meeting either at the Treasury or the White House to begin drafting the legislation.

Mr. SHANNON. When was that?

Mr. SCHMULTS. I don't know when that was. I believe it was the week after the announcement.

Mr. SHANNON. After the announcement?

Mr. SCHMULTS. After the January 8 announcement.

Mr. SHANNON. So you were aware of no legislative proposals until after the announcement?

Mr. SCHMULTS. No; I was aware, I believe it was Mr. McNamar or it may have been somebody else raised it at one of our meetings prior to the January 8 announcement. As I recall it was about whether it might not be desirable to have legislation, but that is the extent of my recollection on that.

Mr. SHANNON. It didn't occur to you that it might be nice to have that legislation ready when you announced the decision in the case?

Mr. SCHMULTS. Our focus, I must say, at the Justice Department, was on the case and getting the filing made.

Mr. SHANNON. Mr. Wallison, when did you first discuss the legislation?

Mr. WALLISON. The first time I heard any suggestion for the legislation was at one of the earlier meetings. We had one on the 22d or 23d of December at which Mr. McNamar mentioned it. I did not get involved in the drafting of legislation until after the announcement was made.

Mr. SHANNON. Thank you very much.

Chairman ROSTENKOWSKI. Mr. Matsui will inquire.

Mr. MATSUI. Thank you, Mr. Chairman.

Mr. McNamar, I would like to ask you again, because I want to make sure I understand the situation, from the 22d until the 29th and then the 31st, you had crystallized your decision to the point where you became opposed to the prior position of the Treasury. You made that decision based upon the December 22, memo from

Mr. Wallison, the draft brief and the brief that you saw both on the 23d and 29th?

Mr. McNAMAR. The second brief being the so-called narrowed brief, yes.

Mr. MATSUI. Right, and also you read between 6 to 12 opinions, all of which probably supported the Nixon administration position.

Mr. McNAMAR. No, they did not.

Mr. MATSUI. You read the dissents. You read——

Mr. McNAMAR. I read the entire majority and——

Mr. MATSUI. The district court opinion then that supported, for example, the *Green* case that was reversed, is that what you are saying?

Mr. McNAMAR. I read the district court's opinion and I read the circuit court of appeals opinion.

Mr. MATSUI. You said you didn't receive any memorandums though except for those that I just discussed during that time?

Mr. McNAMAR. I think that is right. There may have been some other memorandums that came from the General Counsel's Office. If there were, they were relatively short on one point or another all in the record.

Mr. MATSUI. Right, if we have the——

Mr. McNAMAR. You have got them.

Mr. MATSUI. If it is not there, you didn't really see it?

Mr. McNAMAR. That is correct.

Mr. MATSUI. But you did have a number of suggestions with a number of people as well?

Mr. McNAMAR. Yes.

Mr. MATSUI. Who were these people that you discussed it with? Mr. Shannon went into some of them. Was it Mr. Wallison that you basically discussed this with, kind of kicked it around over coffee trying to come to a decision.

Mr. McNAMAR. I had a number of meetings with Mr. Wallison. He was away during Christmas. I talked to Mr. Chapoton on the phone. I talked to people at the Justice Department.

Mr. MATSUI. Did Chapoton say that the original opinion was wrong?

Mr. McNAMAR. Mr. Chapoton really wasn't briefed on the issues. I sent all of the papers I had down to Houston where he was at the time, including some court cases, and the brief, whatever I had at that point in time.

I would guess that was approximately the 27th, somewhere in there, 28th, maybe later. I am not certain of that.

Mr. MATSUI. Mr. Chapoton didn't say that the Nixon position was wrong though, did he, before the 31st, or did he?

Mr. McNAMAR. No, he did not, that is correct. I talked to Commissioner Egger. I talked to Ken Gideon, the Chief Counsel of the IRS.

Mr. MATSUI. And what was his position, the Chief Counsel?

Mr. McNAMAR. Their position was that they wanted to go forward on the case, so they would finally have a Supreme Court determination so that they would have some certainty. Again you asked that question as to their rationale, but I think their greatest concern was for a final determination and some certainty on the question.

Mr. **Matsui**. Right.

Mr. **McNamar**. As opposed to the legal theory, because they, at least at that time, were supporting the so-called charitable trust concept. That is what I found unpersuasive in both the 23d and the 29th briefs of the Solicitor General's Office.

Mr. **Matsui**. Mr. McNamar, in order to shorten this, was there anybody you spoke to from the 22d to the 31st when you actually made your decision that said the Nixon position was wrong? And could you name that person, and what dates that occurred in your discussions?

Mr. **McNamar**. I can't answer the question in that way because at any point in time there were people who were arguing that under the so-called charitable trust concept, conformity with public policies was a precondition to having 501(c)(3) exempt status. I don't know who they were in these arguments back and forth, but you have got all the names, I think.

Mr. **Schmults**. May I?

Mr. **Matsui**. Let me pursue this.

Mr. **McNamar**. I am not sure where you are going.

Mr. **Matsui**. Where I am going is, I want to know who it was that actually adopted and said that the position you currently hold is a right position because it seems like everybody except——

Mr. **McNamar**. I did.

Mr. **Matsui**. I know you did, but I mean what did you base it upon?

Mr. **McNamar**. I based it on a reading of the case, the extensive discussions that we had, and the memorandums, the Solicitor's draft briefs that I had read.

Mr. **Matsui**. But all of the decisions were the other way.

Mr. **Schmults**. May I——

Mr. **McNamar**. Excuse me, I tried to bend over backwards to justify what the IRS had been doing. That is why we sent the Solicitor's Office back the second time. We said try again, convince us this is right, please, and they couldn't.

Mr. **Matsui**. What did they have to tell you that the original Department's position was wrong? I mean you were reading everything that seemed to support the Nixon position. I want to know what opinions you relied upon, what legal documents, what person you relied upon to make you change your mind. I practiced law before. If everybody tells me it is one way and I read all the cases, most of which tell me it is one way, and I read the memorandum and they tell me it is one way.

Mr. **McNamar**. They don't though. I did read as I mentioned to you *Bob Jones* v. *Simon,* and page 740 in that case is dispositive of the *Green* case and vitiates any argument that the *Green* case has precedential merit.

Mr. **Matsui**. I would be happy to——

Mr. **Schmults**. I think I can answer that and it is an important question. Although the memorandum which reflected the legal research was not done until January 5 or 6, whenever it was, clearly Mr. McNamar and others at the Treasury were receiving oral advice from the Department of Justice that that was our rather strong developing view, that the IRS did not have any authority under the law to withhold the tax exemptions. That research was finally reflected, and that oral advice was confirmed, in the memorandum that was prepared and distributed I think on the night of January 5 or January 6. We arrived at our final decision at the Department of Justice which was the same as the earlier advice that I among others gave Mr. McNamar at the meeting that the Attorney General held in his office or in his conference room that went on for 2½ hours late in the afternoon of January 6.

Chairman **Rostenkowski**. The time of the gentleman has expired.

Mr. Anthony will inquire.

Mr. **Anthony**. Thank you, Mr. Chairman.

I would like to pursue quickly the question that I asked earlier, and I would like to rephrase it. That was I asked you earlier are you willing to confess error and you said no you are not willing to confess error.

I would like to go back. Procedurally though you could have filed a motion to confess error rather than file a motion to vacate the lower court decision as moot, could you not?

Mr. **Reynolds**. I think we could have taken that route, that is correct.

Mr. **Anthony**. So, procedurally, it was an available option?

Mr. **Reynolds**. Procedurally that was one available option.

Mr. **Anthony**. And had you confessed error, would then those issues not have been clearly before the Supreme Court so that they could better have a chance to consider whether or not to accept them and then to render a judgment on them?

Mr. **Reynolds**. I think that what the Court would have done I suspect——

Mr. **Anthony**. Let's don't suspect what the Supreme Court is going to do.

Mr. **Reynolds**. I am trying to answer your question. I think that the response to that filing would have been the same response as to the filing——

Mr. **Anthony**. But you are guessing.

Mr. **Reynolds**. I can only guess, that is right. I am not up there.

Mr. **Anthony**. I understand that, so the other guess is just as reasonable to assume.

Mr. **Reynolds**. The other guess being that they would have what?

Mr. **Anthony**. That they would have accepted it. I mean, you were even saying earlier that they would have accepted it. Could you do it today? Could you get up and walk out of this chamber and procedurally go file a motion to confess, withdraw your motion to vacate the lower court decision as moot? It is still a——

Mr. **Reynolds**. I suspect that that wouldn't be totally impossible. I would have to think about that for a long time.

Mr. **Bailey**. That is a great question.

Mr. **Reynolds**. If you are asking me as a procedural matter whether that could be done, I think my answer is certainly we could procedurally do it. It would be up to the Court to determine whether it would accept that filing.

Mr. **Anthony**. Are you willing to do that?

Mr. **Reynolds**. I am not prepared really to answer that question. You just asked me the hypothetical.

Mr. PICKLE. Would the gentleman yield on that question?

Mr. ANTHONY. Yes, I yield if I could preserve a couple of seconds.

Mr. PICKLE. Along this same line, this is in accord with a question I asked earlier. With regard to confessing error, apparently you have some hesitation whether you should do that. But at least you would consider it. Now, my question along the same line is this. Would you file a brief, or whatever you file with the Supreme Court, saying that in view of the fact that you asked the Court to vacate, the case might not get to the Court, even though legally some other third-party group might file a suit. But would you be willing to file a brief with the Court saying that since this case ought to be heard, since it is important, that you would be willing for the case to be pushed by some other party—a party that you would endorse or recommend—so we could have a hearing on it? Would you do that? We are trying to find an answer to the impasse.

Mr. REYNOLDS. I appreciate that. I think that we can take that under advisement and certainly consider it. If you are asking me to give you an answer off the top of my head the way you have asked me that question I don't have at this moment an answer. I can see some questions that are raised by what you are asking, but I certainly can tell you that we would be willing to consider that suggestion and take it under advisement and give it some thought.

Mr. CONABLE. Will the gentleman yield?

Mr. ANTHONY. Yes, I would yield to Mr. Conable.

Mr. CONABLE. I must say I think we are expecting a lot if we expect to make a decision like that here. This is the only administration in my memory that wouldn't have taken the claim of executive privilege long before this with the kind of interpretation we have been getting on this thing about internal negotiations relative to this matter.

Mr. ANTHONY. Go ahead and respond.

Chairman ROSTENKOWSKI. The gentleman has 1 minute left.

Mr. ANTHONY. I yield to Mr. McNamar to respond.

Mr. MCNAMAR. If I may continue to respond to Mr. Pickle's question because I understand what you are trying to do, and we are not unmindful of what the Congressman has raised here. I don't think that I could support the position that we are wrong legally.

On the other hand, given the things that have been said here today, I would be willing to urge that we file with the Supreme Court, so they have official judicial notice, the record of the testimony here including the earlier witnesses. This would put the Court on notice of this controversy and aid them in whatever determination they want to make. I think that goes in your direction.

Mr. ANTHONY. I would like to claim back my time. I just have got a couple of extra questions. It was not a hypothetical question to ask you procedurally could you do it and would you do it. I fully understand that you are not prepared to give a detailed answer to such a complicated although short and simple question.

If permissible, I would request of the chairman to allow you an opportunity to respond to that question, because I think it is a very important procedural legal question that needs to be addressed, and have your position stated on the record, and if you could do it and if you would not do it, the reasons why you would refuse to do it.

[On February 25, 1982, the Department of Justice released the following statement:]

DEPARTMENT OF JUSTICE

For Immediate Release:

THURSDAY, FEBRUARY 25, 1982.

The Department of Justice filed two motions today in the United States Supreme Court in the *Bob Jones* and *Goldsboro* cases. The motions informed the Court that the United States was seeking permission to file out of time a brief that supports the two schools' argument that section 501(C)(3) of the Internal Revenue Code does not authorize the Internal Revenue Service to deny them tax exempt status. The brief will contend that the Revenue Rulings relied upon by the Commissioner of Internal Revenue to deny tax exempt status to the two schools were based upon erroneous interpretations of the tax law. However, the brief will oppose the schools' constitutional claim that their First Amendment right to free religious belief and exercise guarantees them tax exempt status.

The papers filed today inform the Court that the two cases are no longer moot by virtue of an order of the D.C. Circuit preventing the Internal Revenue Service from granting tax exemptions to the two schools. The papers explain that the suggestion by the Government in its January 8 filing that the cases are moot is no longer appropriate because of the Circuit Court's order which was entered on February 18, 1982. In light of that order, the Commissioner of Internal Revenue will not grant tax-exempt status to the two schools or revoke the applicable Revenue Rulings pending the Supreme Court's final disposition of these cases.

The Government agreed with the suggestion of several friends of the court (amici) that the Court should appoint counsel to argue in support of the judgments of the Fourth Circuit in these cases.

The Government believes that the case would be ready, should the Court so determine, to be heard during April. The Department of Justice has advised the Court that the brief of the United States will be filed this week.

[See p. 357 for motions filed by the Department of Justice on February 25, 1982, with the Supreme Court and the brief filed on February 26, 1982.]

Mr. ANTHONY. And then my last and final question would be simply this:

As I take it, you are the attorneys for the people, the Congress is part of the people. What if we passed a resolution tomorrow that instructed our attorneys to take a position to confess error, withdraw the motion to vacate, so that the issues could be squarely before the Supreme Court and the Supreme Court could hear those issues, rule on those important issues, in a very fast and timely manner. What would you do if the Congress passed such a resolution?

Mr. MCNAMAR. It is impossible to respond to that without knowing the language of the resolution. If you passed it that quickly, let's pass the bill that we proposed.

Mr. ANTHONY. I yield back any time I may have.

Chairman ROSTENKOWSKI. Mr. Pickle will inquire.

Mr. PICKLE. Mr. Secretary, I am encouraged that you would at least file a recitation of the events or the facts. I would hope you do more than that. Otherwise the case might not be heard and it is important. In my opinion the whole country is frightened and embarrassed about this ruling, and the way it has been handled. And for the good of the country we need to get it resolved. Now, we need your cooperation on it. You don't have to 'fess up that you were wrong. Though some of us might think you ought to do that, all we ask is that you at least help us get to the Court and get this resolved. If you don't, the onus is going to be on your backs as the ones who temporarily halted the progress of civil rights in this country, and surely you don't want that as a conclusion.

Chairman **Rostenkowski**. Mr. Bailey will inquire.

Mr. **Bailey**. Thank you, Mr. Chairman.

Mr. McNamar, following the line of reasoning in the discussion with Mr. Downey, Mr. Anthony, Mr. Pickle, and Mr. Martin, I have two questions basically. The nuts and bolts of any political issue, as you generally know, revolves around procedure—who made the procedural issue to take the moot route? Is that you?

Mr. **McNamar**. I made the decision that we could no longer support the other theory, and it was really a joint decision after that.

Mr. **Bailey**. You know that is not—please, now. What was the reasoning? if I may ask, because I am sure that procedure was discussed. We can deal with substantive issues. That is a very minor part of a legal case, generally speaking, but when we get down to procedural approaches it is very vital.

Some discussion had to be taken somewhere, and I am asking you, you know, for your recollection and the gentlemen who are sitting here, why. It is very important to know why the route was taken to vacate on the mootness ground. Why did you make that motion?

Mr. **Schmults**. We thought that was the strongest——

Mr. **Bailey**. Let me ask him.

Mr. **McNamar**. I think the real reason is because I would have had to have filed a paper in the Supreme Court that said something that I did not believe was the law. To do otherwise would have meant going to the Supreme Court and saying I don't think this is the law. All I am doing is trying to carry out my oath. I may be right or wrong on the law but I am telling you, Supreme Court, I don't believe this is true but I want you to handle it because it is too hot politically. I wasn't willing to do that.

Mr. **Bailey**. In the actual discussions, was there any discussion revolving around what kind of response you expected from the Court, and how difficult a position it put you in, because you know we talked earlier. I have argued cses, I have had the opportunity to defend people I knew were guilty, but as an advocate I performed my duty as a lawyer.

Mr. **McNamar**. As a hired lawyer, I could have argued either side of it.

Mr. **Bailey**. I wasn't getting paid anything, to tell you the truth.

Mr. **McNamar**. As someone who has sworn to take an oath of office and sit in a chair of responsibility, I could not.

Mr. **Bailey**. Could you think about that and go back over in your mind and give me some reasons, just personally. I am curious as to what was involved in the decision to go that route. We talked about in all fairness the kind of confrontation. Somebody had to have discussed this. You are too bright and capable not to realize the kind of confrontation we are talking about.

There is no reason in the world why this Congress should ever have to go and pass any kind of resolution or interpretations of its own decisions given the case law and the decisions already at hand.

Mr. McNamar. As I said in the Senate Finance Committee the other day, I felt very much like the little kid who said the emperor has no clothes.

Mr. Bailey. The emperor is getting awfully mad. Naked or not, I think that if you would give me some reasons why you did that, I would be very happy. I would be much happier and at ease, and I think you would find an easier way to resolve this problem.

Thank you, Mr. Chairman.

Would you submit that for the record? Just submit that explanation, what was resolved, what were the discussions and reasons why you advocated and took that procedural approach.

Thank you. Thank you, Mr. Chairman.

Chairman Rostenkowski. Gentlemen, I want to thank you for joining us this afternoon.

Mr. Schmults. Thank you, Mr. Chairman.

Mr. McNamar. Thank you very much, Mr. Chairman.

Chairman Rostenkowski. Commissioner Egger.

Mr. Conable. Thank you for your patience too, Commissioner. You have been around a long time today.

Mr. Ford. Most of us wait 3 or 4 months for our income tax refund, so I am sure he doesn't mind waiting.

Chairman Rostenkowski. Welcome to the Ways and Means Committee, Mr. Commissioner. I want to also welcome your Chief Counsel, Mr. Gideon, to the committee. You may proceed with your testimony. I want you to know, Mr. Commissioner, that we are extremely grateful for your patience. You have been here all day.

Mr. Pickle. Mr. Chairman, I wonder if Mr. Egger would yield to me before he makes his statement, as I have got to go. I want to ask a few questions, and I will submit them in writing pertaining to the possible effect on the pending rule in social security cases or social security programs, and social security taxes. Will the social security program be affected?

I want to know if these schools are ruled tax exempt, then do they have an option on social security and if they do, could they make a back claim on the social security payments.

Mr. Egger. I would prefer not to make a response to that without a much more careful analysis.

Mr. Pickle. I will submit them to you in writing.

[Questions and answers referred to follow:]

Responses to Representative Pickle

Question 1. How does the finding that the two schools in question are tax-exempt affect their participation in the social security program?

Answer. Organizations described in section 501(c)(3) have the option to waive nonparticipation for their employees in the social security program. The Goldsboro Christian Schools currently do not participate in the social security program based upon their position that they are exempt. Thus, no change would be anticipated on behalf of Goldsboro Christian Schools. We are unable to discuss the participation or nonparticipation of Bob Jones University in the social security program because of the restrictions imposed by section 6103 with regard to disclosure of tax return information. The Bob Jones University litigation before the Supreme Court deals solely with liability for Federal unemployment taxes.

Question 2. Is there any indication, at this time, of either school's intention concerning participation in social security?

Answer. Yes. The Goldsboro Christian Schools do not intend to participate (based upon their claim to exempt status). Because of section 6103, we cannot discuss the intention of Bob Jones University with respect to social security participation.

Questions 3 and 4. Has either school paid their FICA tax and would they be due a refund if they are eventually declared tax exempt or haven't they paid the tax in dispute and would have to pay back taxes if they are found to be tax exempt?

What amount of FICA payroll taxes are in dispute in these two cases?

Answer. At dispute in the Goldsboro Christian Schools case is that organization's claim for a refund of $1,187.39 in FICA taxes for the years 1970 through 1972. The United States has filed a counterclaim which includes $80,393.72 in FICA and income tax withholding for the years 1970 through 1972. The amount of FICA tax involved in the Government's counterclaim is not separately stated in the Service's records. If found not to be tax exempt, the Goldsboro Christian Schools could be liable for the back taxes set forth in the counterclaim. Again, because of section 6103 and because the Bob Jones case deals with Federal unemployment tax liability, we are unable to respond to this question with respect to Bob Jones University.

Question 5. If Congress did not act on this issue and the IRS took the position that it didn't have the authority to deny tax-exempt status to not only the two schools in question, but also to all similar schools, what would be the annual revenue loss to the social security trust funds? How many schools would be involved?

Answer. We are unable to give a definite answer to this question. Our records do not reflect the number of non-exempt organizations operating racially discriminatory private schools which currently participate in the social security system, nor do our records indicate the amount of social security contributions made by such organizations.

Chairman ROSTENKOWSKI. Mr. Commissioner, would you care to summarize your statement?

Mr. EGGER. I assure you it will be short. I have a longer statement which I would like to put in the record, but I have a shorter statement.

Chairman ROSTENKOWSKI. Your entire statement will appear in full in the record.

STATEMENT OF ROSCOE L. EGGER, JR., COMMISSIONER OF INTERNAL REVENUE, ACCOMPANIED BY KENNETH GIDEON, CHIEF COUNSEL, INTERNAL REVENUE SERVICE

Mr. EGGER. Which I would like to go through because it brings out a bit of perspective on this problem that I don't think has been brought out heretofore. Let me say that section 501(c)(3) of the code provides for exemption of organizations that are organized and operated exclusively for religious, charitable, or educational purposes. This basic language in the code had its origin in our tax laws in the Tariff Act of 1894, and has remained largely unchanged since then. Until the 1950's, the Service interpreted this language quite literally in determining whether an organization was entitled to exemption.

In particular, in the case of organizations described as charitable, in order to qualify as "charitable," the organization had to demonstrate that it provided aid to the poor and distressed regardless of other qualifications.

An entirely different approach was taken in the estate tax area, that is, with respect to charitable deduction for estate tax purposes. There, the term "charitable" was interpreted broadly so as to include organizations generally deemed to be beneficial to the community. In retrospect, it is difficult to understand how such different views of almost identical statutory language remained unreconciled for so many years.

By the 1950's the Service's narrow interpretation of the term "charitable" in the income tax area had become very difficult to defend. In a 1953 case, for example, the Tax Court rejected this interpretation and held that an organization operating a public beach qualified for charitable exemption. The court held that the word "charitable" was not limited solely to relief of the poor, but included organizations that promoted the general social welfare such as promotion of health, lessening the burden of government, easing neighborhood tensions, combating juvenile delinquency, et cetera. Throughout the early 1950's, the Service was faced with the necessity to categorize a rapidly increasing number of organizations that were formed to deal with a variety of social, economic, and governmental issues.

The problem, of course, was that many of these organizations, although seemingly quite beneficial to society, did not fit within any specific category set forth in the statute.

The first steps toward the Service's current interpretation of section 501(c)(3) were taken in 1959. The inability of the Service to deal with the problems of classifying this new generation of social institutions required a rethinking of the narrower interpretations placed on the code section.

The result of this reconsideration led to an expansion of the interpretation of the term "charitable." In effect, the Service adopted in the income tax area the interpretation that it had long followed in the estate tax area. This change was made by adopting the regulations as they exist today. These regulations make it clear that the term "charitable" is used in section 501(c)(3) in its generally accepted legal sense. Thus, charity is far more than the relief of poverty and includes, in addition to some of the other purposes specifically identified in the statute, many others that have been recognized by the courts as legally charitable.

Change in the regulations in 1959 had little, if anything, to do with the private school area. In fact, there were probably few, if any, in the IRS or Treasury that had any idea that the newly adopted interpretation of section 501(c)(3) would have any real bearing on the exemption of schools. What was foreseen was that the new interpretation recognized that there was a basis for the exemption of many types of charities not literally described in the statute. Thus, for example, under the 1959 regulations, exemption was made available more generally to hospitals and old-age homes. Exemptions were also granted to environmental groups, public interest law firms, and historic preservation societies.

In retrospect, it might have been better if the Service and the Treasury had at that time referred this entire issue to Congress instead of developing a solution by changing the regulations. Many problems would surely have been avoided had the Service obtained from Congress at that time the precise statement with respect to the types of organizations to be exempted and a clear statement of the standards to be observed in applying the exemption rules. At the time, however, changing the regulation undoubtedly appeared to offer a solution to the problem. These amendments brought the administration of the income tax area in line with that in the estate tax area and provided a framework for dealing with the many difficult questions facing the Service.

Moreover, subsequent rulings were widely accepted as a pragmatic way for the Service to proceed in the exemption area. In other words, a reasonable way was found to adopt a legal theory upon which to base many decisions which were, for the most part, universally accepted as desirable.

It was not until the 1960's, when the Service first faced the problem of segregated schools, that there was any significant criticism of its broadened interpretation of section 501(c)(3). However, once again, an expanded definition was necessary. To deal with this problem, it became necessary to read the Code section as applying the charitable concept to other exempt purposes specifically set forth in the statute. These were hard cases, and here for the first time the application of the principles of the common law of charity were employed in a restrictive way rather than in a liberalizing fashion.

The dilemma facing the Service and the emotional level of the debate was exacerbated significantly in 1978 when the Service announced substantially revised proposed procedures. There was a huge outcry. Thousands of communications received by the Service were strongly opposed to the procedures. Probably no other event has had such a material effect on this whole problem as these proposed rules, which were widely perceived as an unauthorized, aggressive, "guilty until proven innocent" intrusion by the Service in that area.

As a follow-up development, Congress passed the Dornan-Ashbrook appropriation riders. These riders made it clear that the Service could not implement its proposed procedures, but did not resolve the question of how the exemption statute should be interpreted. The many difficult issues were thus left to the administration and for the courts to resolve.

When I said at the beginning of these remarks that I wanted to put the school problem in context, I meant it should be seen not as an isolated issue, but as part of a continuing evolution of dealing with a long list of problems in the exemption area. Most of the current, nontechnical views of the schools probably are not really the result of informed opinions on how the exemption statute should be construed, but the result of strongly held social and moral convictions.

The fact remains, however, that for the IRS the authority to proceed depends upon proper interpretation of the statute. It is the statute that the IRS must look to in determining what, if any, role it has in resolving the school problem.

Let me summarize my feelings this way: We have had essentially the same exemption statute for over 80 years with relatively little guidance from Congress on how it should be applied. On the basis of this statute and the historical interpretation which I outlined, we have recognized exempt status under the charitable classification some 300,000 organizations of a nearly limitless variety. Many of these could not have been so identified on the basis of the narrow interpretation of the statute which was applied prior to 1959. We have encountered many interpretative difficulties, and we are certain to encounter many more in the future.

There certainly will be new types of organizations, serving the evolving needs of society, and for which there will be no precedent in the exemption area. Similarly, there will be groups with purposes totally repugnant to law and public policy seeking haven in the exemption statute and the dilemma will continue. But this dilemma neither began with nor will it end with the segregated schools issues.

The problem has, however, called into serious question the Service's legal authority for expanding the interpretation of the Code in the fashion I have described because of the many concerns expressed, not only in the area of race discrimination in educational institutions, but in other potential problem areas. This administration, following a searching review of the legal basis for Service action, concluded that the Service is without the authority to interpret section 501(c)(3) to deny exemption to private schools on the basis of racial discrimination. Accordingly, it has sought to deal immediately and directly with this particular issue through its proposed legislative enactment. We welcome explicit congressional guidance and sanction in this area. We all recognize this is not a total solution to the entire problem, but it does deal immediately with a problem, which has severe and grave consequences.

That is the end of the statement I will make here. I will be glad, with Mr. Gideon, to attempt to answer any questions you or the committee has to ask.

[The prepared statement follows:]

STATEMENT OF
ROSCOE L. EGGER, JR.
COMMISSIONER
OF INTERNAL REVENUE

I appreciate the opportunity to appear today to discuss the Service's administration of the law with respect to tax exemption for racially discriminatory private schools and deductibility of charitable contributions to them. Accompanying me is Mr. Kenneth W. Gideon, IRS Chief Counsel.

Service involvement in this area began after the Supreme Court decisions in *Brown v. Board of Education* and *Bolling v. Sharpe*[1] holding racial discrimination in public education to be unconstitutional. After these decisions, a number of segregated private schools were established with tuition and textbook assistance from state and local governments. Federal courts in the 1960s ruled that government aid to these racially discriminatory private schools violated the equal protection clause of the Constitution.[2]

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[1] *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954)

[2] *Griffin v. Board of Supervisors of Prince Edward County*, 379 F. 2nd 48 (4th Cir. 1964); *Pointdexter v. Louisiana Finance Assistant Commission*, 273 F. Supp. 833 (ED La 1967), Affd. per curiam, 389 U.S. 571 (1968); *Coffey and United States v. State Education Finance Assistance Commission*, 296 F. Supp. 199 (SD Miss 1969)

These court rulings led to deliberations by the Service, the Treasury Department, and the Department of Justice as to whether private segregated schools would be entitled to tax exemption and whether contributions to these schools would be deductible. As an interim measure while assessing the effect of court decisions, the Service in 1965 suspended issuing rulings to the increasing number of private schools seeking exemption from Federal income tax. After considerable review, the Service announced in 1967 that tax exemption would be denied and contributions would not be deductible to racially segregated private schools whose operation with State and local government aid was unconstitutional or in violation of the laws of the United States.[3] However, racially discriminatory schools that operated without state support or aid would continue to be exempt from Federal income tax.

In 1969, the Service was sued by the parents of black children in the State of Mississippi. Their argument was that the availability of tax exemption and deductible contributions to a private racially discriminatory school amounted to unconstitutional government action. They asserted that these schools failed to qualify for exemption because their practices violated clear Federal public

[3] IRS News Release dated August 2, 1967

policy against racial discrimination. A three-judge Federal court in the District of Columbia on January 12, 1970, ordered the Service in a preliminary injunction not to recognize tax exempt status or allow charitable contributions to racially discriminatory private schools in Mississippi.[4] On June 26, 1970, the court entered a supplemental order requiring the Service to suspend advance assurance of deductibility of contributions to segregated schools in Mississippi.[5]

In July 1970, the Service announced that it could no longer legally justify allowing tax exemptions to private schools that racially discriminate nor treat contributions to such schools as tax deductible.[6] To qualify for such benefits, all private schools were required to adopt and publicly announce a policy of racial non-discrimination. The then Commissioner of the Internal Revenue Service indicated that the legal aspects of this issue had been discussed and studied in great depth within both the Treasury Department and the Department of Justice and that both departments were in accord with the position.[7] The White House also issued a press release endorsing this position.

[4] *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970) [preliminary injunction], appeal dismissed sub nom. *Cannon v. Green*, 398 U.S. 956 (1970), appeal from subsequent orders dismissed sub nom. *Coit v. Green*, 400 U.S. 986 (1971).

[5] *Green v. Kennedy*, 26 AFTR 2d 70-5416 (D.D.C.) [revised preliminary injunction]; *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) [permanent injunction], aff'd sub nom. *Coit v. Green*, 404 U.S. 997 (1971).

[6] IRS News Releases July 10 and 19, 1970

[7] Testimony before the Select Committee for Equal Educational Opportunity on August 12, 1970

Concluding that racially discriminatory private schools were not eligible for tax benefits available to charities, the three-judge court in Green entered the permanent injunction in June of 1971. A challenge on the merits of the order was made by parents supporting schools with exclusively white enrollments. On an appeal by the white parents, the United States Supreme Court affirmed per curiam the lower Court.[8]

In 1970, the Service examined private schools in Mississippi and, applying similar procedures surveyed 15,000 schools nationwide. These actions resulted in revocation of the tax exempt status of over 100 schools that would not adopt and publicize a racially nondiscriminatory admissions policy. Included among the schools that refused to adopt such a policy was Bob Jones University. It should be noted that the Service gave every private school with a racially discriminatory policy an opportunity to change that policy before it took action.

Since 1970, the Service has taken a number of additional steps to implement the racial nondiscrimination requirement. In 1971, IRS published a ruling explaining the nondiscriminatory requirement,[9] and, in 1972, the Service published a procedure that established guidelines for publicizing a school's racially nondiscriminatory policy.[10]

[8] Coit v. Green, 404 U.S. 997 (1971). The Supreme Court in Bob Jones University v. Simon, 416 U.S. 725, 740, fn. 11, stated that the Green affirmance "lacks the precedential weight of a case involving a truly adversary controversy."

[9] Rev. Rul. 71-447, 1971-2 C.B. 230

[10] Rev. Proc. 72-54, 1972-C.B. 834

Following its initial nationwide survey of tax exempt schools, the Service during 1973 through 1975 had an examination coverage which ranged from 2% to 4%. During this period, an examination of Goldsboro Christian Schools was conducted because of its claim for refund of certain employment taxes. This examination resulted in the litigation which became the companion case to Bob Jones.

Experience with these examinations indicated to the Service that specific guidelines were needed to ensure uniform enforcement nationwide and the Service proceeded to develop these. The United States Commission on Civil Rights, the Civil Rights Division of the Justice Department, and several members of Congress also expressed the need for specific examination guidelines.

In December 1975, Revenue Procedure 75-50 was published[11] clarifying IRS guidelines for tax exempt schools and establishing recordkeeping requirements. Recognizing the sensitivity associated with this particular issue, the Service took the unusual step of publishing the procedure in proposed form to afford the public, educational institutions, and other interested parties the opportunity to comment. The final version of the procedure required all tax exempt private schools to adopt formally a racially nondiscriminatory policy, to refer to the policy in all brochures and catalogues, and generally to publish notice of this policy annually in a newspaper or by use of the broadcast media. Detailed examination guidelines were also issued during this period.

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[11] Rev. Proc. 75-50, 1975-2 C.B. 587

Also in 1975, the Service published a revenue ruling clarifying and explaining its position that organizations, including churches, which establish private schools with a policy of refusing to accept certain racial and ethnic groups will not be recognized as tax-exempt charities under section 501(c)(3) of the Code.[12] Revenue Procedure 75-50, however, made it clear that a school which enrolls students based on religious affiliation will not be deemed to have a discriminatory policy if the religion is open to all on a racially nondiscriminatory basis.

In 1976, the plaintiffs in the Green case reopened that suit, asserting that the Service was not complying with the court's continuing injunction that racially discriminatory Mississippi private schools be denied tax exemption and requesting further injunctive relief.[13] In addition, a companion suit was filed, now entitled Wright v. Regan, asserting that the Service's enforcement of the nondiscrimination requirement on a nationwide basis was ineffective.[14]

[12] Rev. Rul. 75-231, 1975-1 C.B. 158. See also TIR 1379 (5/27/75) stating that the de minimis rule will be followed in administering Rev. Rul. 75-231.

[13] Green v. Simon, Civ. no. 1355-69(D.D.C)

[14] Wright v. Simon, Civ. no. 76-1426 (D.D.C.). In Wright v. Blumenthal, 480 F. Supp. 790 (D.D.C. 1979), the Court dismissed plaintiffs' complaint primarily for lack of standing. The decision was reversed in Wright v. Regan, 81-2 U.S.T.C. ¶9504 (D.C. Cir. 1980). The Solicitor General has filed a petition for certiorari with the Supreme Court to review this decision.

The proposed revenue procedure would have required a private school that had been adjudged discriminatory or one founded or expanded at the time of public school desegregation to make a strong showing of nondiscrimination. The proposed procedure was the subject of over 150,000 letters from the public, and in December 1978, four days of public hearings were held. In February 1979, a revised proposed procedure[18] was published for public comment. It provided greater flexibility for a school to show it is operating on a racially nondiscriminating basis.

As a result of the strong public reaction to the publication of the proposed procedures, hearings were held on April 17, 1979, before the Senate Subcommittee on Taxation and Debt Management of the Finance Committee, and on July 26, 1979, before the Full Senate Finance Committee. The Service also testified before the Subcommittee on Oversight of the Committee on Ways and Means on February 20 and March 23, 1979.

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[18] Announcement 79-38, 1979-11 IRM 33

Also in 1976 the Service undertook to examine 10% of all schools having individual exemption letters under Section 501(c)(3). This coverage continued until July 7, 1978, when elementary and secondary school examinations were suspended because of the reexamination of factors to be used in determining whether a school has a racially nondiscriminatory admissions policy.

As the Internal Revenue Service through the then Commissioner testified before Congressional Committees in 1979, the reopening of *Green* and the filing of *Wright* had caused the Service to examine the effectiveness of its efforts to ensure that only racially nondiscriminatory schools should be recognized as tax exempt.[15] Of special concern to the Service at that time was the fact that some schools that had been adjudged discriminatory by the courts continued to be tax exempt.[16] Accordingly, on August 22, 1978, the Service, as it had in 1975, published for public comment a proposed revenue procedure[17]. It was intended to serve as a guide for IRS personnel and the public for use in determining whether a private school actually operated on a racially nondiscriminatory basis.

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[15] Proposed IRS Revenue Procedure Affecting Tax Exemption of Private Schools: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong. 1st Sess. 479 (1979).

[16] *Norwood v. Harrison* 382 F. Supp. 921, 929 (N.D. Miss. 1974), on remand from Supreme Court, 413 U.S. 455 (1973); *Brumfield v. Dodd*, 425 F. Supp. 528 (E.D. La. 1976)

[17] Proposed Revenue Procedure 73 Fed. Reg. 37, 296 (1978)

On September 29, 1979, amendments to the Treasury Appropriations Bills, by Representatives Dornan and Ashbrook precluded the Service from adopting the proposed revenue procedures and from formulating guidelines, regulations, standards or measures which would cause the loss of tax exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Code unless in effect prior to August 22, 1978. These restrictions have been carried over to subsequent appropriations bills. The 1982 continuing resolutions adopted these restrictions and further restricted the Service from implementing court orders.

On May 1, 1980, a limited nationwide examination program was instituted. In general, examinations were to be conducted only in instances where there was an indication of racial discrimination or where complaints of racial discrimination were made. This examination program continues at this time.

In May and June of 1980, the District Court in Green entered revised injunctive orders against the Service and Treasury.[19] These orders required the Service to review the tax exempt status of Mississippi private schools under standards similar to those proposed by the Service in 1979. For example, a private school founded at the time of public school desegregation was required as a condition for continued exemption to show that it had engaged in objective acts, such as minority recruitment, to overcome an inference that it discriminated, notwithstanding a published policy of nondiscrimination. On July 7, 1980, the government announced that

[19] Green v. Miller, 45 AFTR 2d 80-1566 (D.D.C. 1980)

It would not appeal the decision.

As a result of complying with the revised injunctive orders, the Service in August, 1981 revoked the exempt status of five organizations operating private schools in Mississippi. These organizations are currently challenging the revocations before the U.S. Tax Court.

Some Mississippi churches refused to provide the Service with information about schools operated by them, and at our urging the Justice Department requested and was granted a stay of the 1980 injunctive orders in *Green*, pending resolution by the court of legal objections raised by an intervening church.

Just prior to my becoming Commissioner, the Courts of Appeals had sustained IRS revocations of tax exempt status in the cases of Bob Jones University, Goldsboro Christian Schools, and Prince Edward Educational Foundation based upon the racially discriminatory policies of those institutions.[20] It should be noted that the Court of Appeals decisions in the *Bob Jones* and *Goldsboro* cases were not unanimous, and that in *Bob Jones* in particular there was a strong dissent based on the very concerns that led to the Administration action. When I became Commissioner, the Service was faced with the dilemma of complying with both the Dornan and Ashbrook riders and the *Green* injunction. These Congressional

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[20] *Bob Jones University v. United States*, 468 F. Supp. 890 (D.S.C. 1978), revd. 639 F. 2d 147 (4th Cir. 1980); *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), affd. by unpublished order; *Prince Edward School Foundation v. United States*, 478 F. Supp. 107 (D.D.C. 1979), affd. by unpublished order No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 750 U.S. 944 (1981).

RESTRICTIONS HAVE PREVENTED US FROM DEVELOPING REASONABLE RULES RESPONSIVE TO CRITICISMS FROM CONGRESS AND THE PUBLIC WITH REGARD TO THE STANDARDS AND CRITERIA WHICH SHOULD BE FOLLOWED IN DETERMINING WHETHER A SCHOOL IN FACT HAS A RACIALLY DISCRIMINATORY POLICY.

AS A TAX ADMINISTRATOR, I FOUND MYSELF IN THE UNCOMFORTABLE POSITION OF BEING ORDERED BY A COURT TO APPLY ONE SET OF RULES TO MISSISSIPPI SCHOOLS WHILE AT THE SAME TIME, I WAS BEING PREVENTED BY CONGRESS FROM DEVELOPING UNIFORM RULES TO APPLY ELSEWHERE. THIS SITUATION WAS FURTHER AGGRAVATED BY THE PASSAGE OF THE CONTINUING BUDGET RESOLUTION FOR FISCAL YEAR 1982 WHICH CONTAINS A REVISED ASHBROOK AMENDMENT PROHIBITING US FROM COMPLYING WITH COURT ORDERS. AS A RESULT OF THIS LATEST CHANGE, SECRETARY REGAN ON OCTOBER 1, 1981, WROTE TO ATTORNEY GENERAL SMITH FOR A FORMAL OPINION CONCERNING THE LEGALITY OF OUR CONTINUED COMPLIANCE WITH THE GREEN INJUNCTIVE ORDERS.

AS PART OF MY EVALUATION OF HOW THE SERVICE OUGHT TO HANDLE GREEN AND OTHER PRIVATE SCHOOL LITIGATION, I CONCLUDED THAT IMPORTANT CONSTITUTIONAL ISSUES WERE BEING RAISED, PARTICULARLY BY THE CHURCH-RELATED SCHOOLS, AND THAT THEY SHOULD HAVE AN OPPORTUNITY TO HAVE THEIR CLAIMS ADJUDICATED BY THE COURTS. WE CONVEYED OUR VIEWS TO THE DEPARTMENT OF JUSTICE, AND, IN FACT, THE COURT ULTIMATELY ALLOWED INTERVENTION BY A CLASS OF CHURCH-RELATED SCHOOLS IN GREEN. SIMILARLY, I FELT THAT THE BOB JONES AND GOLDSBORO CASES RAISED SIGNIFICANT CONSTITUTIONAL QUESTIONS WHICH NEEDED TO BE DECIDED BY THE COURTS, AND WE PREVAILED UPON THE SOLICITOR GENERAL'S OFFICE TO ACQUIESCE IN BOB JONES' PETITIONS FOR CERTIORARI, EVEN THOUGH A MAJORITY OF THE APPEALS COURT HAD SUSTAINED THE SERVICE POSITIONS.

THE LEGISLATION PROPOSED BY THIS ADMINISTRATION TO ADDRESS THE ISSUE WE ARE DISCUSSING WILL PROVIDE A NATIONAL STANDARD FOR THE DENIAL OF TAX EXEMPTION TO RACIALLY DISCRIMINATORY SCHOOLS. IT IS NOT INTENDED TO AND DOES NOT RESOLVE THE DIFFICULT DEFINITIONAL PROBLEMS INHERENT IN THIS AREA OF THE CODE, SUCH AS DEFINING BROAD GENERAL TERMS SUCH AS "CHARITABLE" AND "EDUCATIONAL."

BEFORE CLOSING, I WAS ALSO ASKED TO COMMENT ON THE PLANS OF THE IRS WITH REGARD TO EXISTING REVENUE RULINGS AND PROCEDURES DEALING WITH RACIAL DISCRIMINATION AND SCHOOLS. CONSISTENT WITH THE GOVERNMENT'S FILING IN THE SUPREME COURT AND MY INSTRUCTIONS FROM THE TREASURY DEPARTMENT, IT IS MY INTENTION TO REVOKE THOSE REVENUE RULINGS AND PROCEDURES AND IT IS OUR INTENTION TO RESTORE TAX EXEMPT STATUS TO THE BOB JONES AND GOLDSBORO INSTITUTIONS PENDING ENACTMENT OF THE ADMINISTRATION'S PROPOSED LEGISLATION.

FINALLY, I WANT TO EMPHASIZE THAT THE ROLE OF THE SERVICE IS AND HAS ONLY BEEN TO ADMINISTER THE EXISTING TAX LAWS. WE LOOK TO THE STATUTES, THEIR LEGISLATIVE HISTORIES, AND THEIR JUDICIAL INTERPRETATION. OUR RESPONSIBILITY IS CONFINED TO ENFORCING AND INTERPRETING WHAT IS IN THE INTERNAL REVENUE CODE.

I WILL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE CONCERNING THE SERVICE'S ADMINISTRATION OF THIS AREA SINCE I TOOK OVER DIRECTION OF THE INTERNAL REVENUE SERVICE.

Chairman ROSTENKOWSKI. Are there any questions?

Mr. RANGEL. I would like to ask whether or not the Service has granted tax exemption to Bob Jones University and Goldsboro schools?

Mr. EGGER. No, we have not.

Mr. RANGEL. Your statement indicated on page 17, "This administration, following a searching review of the legal basis for Service action, concluded that the Service is without authority to interpret section 501."

Were you involved in that searching review?

Mr. EGGER. I was involved in many of the discussions in late December, early January, yes.

Mr. RANGEL. And counsel?

Mr. GIDEON. Yes.

Mr. RANGEL. Neither one of you reached the same conclusions after you went through your searching reviews?

Mr. EGGER. I did not.

Mr. GIDEON. I did not.

Mr. RANGEL. You had a meeting with several Members of Congress supporting the administration's views and indeed did respond to them at every occasion where it was warranted, indicating that your view was in conflict.

Is that correct?

Mr. EGGER. That is correct, Mr. Rangel.

Mr. RANGEL. My last question is that there has been quite a bit of testimony about legal documents that have been worked on that caused the administration to change its view from last December to early January.

Neither one of you, nor the Service, participated in preparing a legal document for the administration to reach the decision that they reached. Is that right?

Mr. EGGER. We prepared brief memoranda for the purpose of telling the Secretary and the Deputy Secretary of the issue. They were not intended as exhaustive legal analysis.

Mr. RANGEL. Thank you, Mr. Chairman.

Chairman ROSTENKOWSKI. Mr. Jacobs will inquire.

Mr. JACOBS. I will pass to Mr. Jenkins.

Mr. RANGEL. Let me say the hypothetical I said earlier as to if these people were the Commissioner of IRS, and I think your response then, Mr. Chairman, was they didn't want to say anything that would have an effect on your integrity.

I would want to state for the record that it has been my view, the records, that you have conducted yourself in the highest fashion of a public official. I did not want the witness' response to believe that. That was not my intention.

Mr. EGGER. I never had any thought they would.

Mr. JENKINS. Thank you, Mr. Chairman.

Commissioner, earlier I raised a question with the administration as to what they would do with the applications now pending in the absence of any congressional action, and they indicated that those would be issued if we did not act.

Now, I am concerned about charitable organizations.

As I understand the existing law, basically what you do in every revenue routing in making a determination on whether or not an organization is charitable under 501(c)(3), is that you in almost every ruling the organization activities will be considered permissible under this section 501(c)(3).

You have one, two, three: One, the purpose of the organization is charitable; two, the activities are not illegal, contrary to a clearly defined and established public policy; three, or in conflict with an express statutory restriction.

Now, the problem that I have—and maybe you can expound upon this—is the definition in your future determinations of what is charitable. Will the Service have to then disregard this provision dealing with public policy in the absence of statutory language?

Mr. **Egger**. There is some confusion about the public policy as such in the charitable area. It is my intention and my understanding that the real debate here, legal debate, goes to the question of whether or not the broader common law of charities interpretation can be applied to any of the terms in 501(c)(3), other than charitable, so that it wouldn't apply in the case of educational, or in the case of religious organizations, which would be qualified as such.

However, in the case of charitable organizations, my understanding and my intention is to apply the regulations as they presently exist.

Mr. **Jenkins**. So you would still take into consideration public policy on those organizations?

Mr. **Egger**. Yes.

Mr. **Jenkins**. You would recognize national public policy even though there is no statute?

Mr. **Egger**. I believe charitable is defined in the regulations in its generally accepted legal sense.

Mr. **Jenkins**. So, we would recognize national public policy in charitable organizations, but we would not recognize public policy in educational, is that right?

Mr. **Egger**. That is correct. It is a very narrow legal issue of whether the broader concept of charity can apply to all of the other six exempt purposes.

Mr. **Jenkins**. I am pleased that you said you will take into consideration national public policy in charitable. I was concerned that I could foresee, in the absence of explicit statutory language, the Service having to grant thousands of exemptions to so-called charitable organizations, where their purpose was absolutely opposite from national public policy. That bothered me.

Mr. **Egger**. I would like to ask the counsel if he has anything to add to that?

Mr. **Gideon**. No, I think that the Commissioner has correctly stated our position at this time.

Mr. **Jenkins**. Thank you.

Chairman **Rostenkowski**. Mr. Jacobs will inquire.

Mr. **Jacobs**. Mr. Commissioner, my friend, Mr. Martin, alluded to my earlier suggestions about a comparability of the social security benefits and their tax exemption, with the denial of exemptions to schools who segregate, in that there wasn't specific statutory language in either case.

I believe Mr. Martin said, after all, people who pay in social security and then get the benefit, they are only getting back what they paid in. I think in most cases—currently, anyway—people do actually get more dollars back than they paid into social security.

I believe it was also correct to say that in the case of Federal pensions, up until the point that you start receiving more than you paid in, you are not taxed for the money that is paid to you, the civil service annuities.

Isn't that specifically provided for by statute?

Mr. EGGER. Yes.

Mr. JACOBS. Well, where are we, then? Aren't you painted into a little bit of a corner? What do I tell my parents? Are they going to have to change their budget a little bit on their social security now?

Mr. EGGER. To the best of my knowledge, it is not my intention to do anything about social security except to continue to treat it as nontaxable.

Mr. JACOBS. You don't feel a little locked in by this precedent now that you can't suck something out of your paw if it isn't absolutely clear English in the statute?

Mr. EGGER. I do not feel locked in on that subject matter, Mr. Jacobs.

Mr. JACOBS. Do you feel locked in on the other subject that it must absolutely be written in the statute before you can deny an exemption for one of the more un-American practices of racial segregation?

Mr. EGGER. What is here is just the normal followon from a debate that has been present in the statute for a long, long time and heretofore we have resolved most of these issues, as we did in 1959, on an expedient basis.

No one objected at that time because by and large the results of it were acceptable to everyone and they offended almost no one. I think now that we got into a controversial area, the debate now comes out.

Mr. JACOBS. Who objected to the policy this time?

Mr. EGGER. Well, I think there has been a raging debate here in the Congress over the procedures that we were to follow, certainly since 1978, as well as in public——

Mr. JACOBS. No, I mean the procedure of determining discrimination, but who objected to denying exemptions where, in fact, discrimination was fairly determined to exist?

Mr. EGGER. No one that I know has objected on that ground. What they have done is to go back and search out whether or not we really had the proper legal authority to——

Mr. JACOBS. Do you have the proper legal authority to suspend taxation and social security benefits for those who are receiving back more than they paid in?

Mr. EGGER. I don't think so.

Mr. JACOBS. You don't have authority for that?

Mr. EGGER. No, if I understand your question correctly.

Mr. JACOBS. Do you find any statutory authority for not taxing those social security payments?

Mr. EGGER. Not specifically in the statute, no. But the historic——

Mr. JACOBS. You are in a pretty awkward spot, it seems to me. Taking the exactly opposite position, in fact people might get a little suspicious because in the one case minorities are involved, in the other case there are an awful lot of good Republicans who get social security benefits.

It might be a little bit awkward to go to the service—and IRS does stand for Internal Revenue Service, and I would hate for people to believe it stands, say, for Institute of Racial Segregation—but a lot of people are beginning to wonder, especially when you have cases like this where the facts are about the same and your conclusions are exactly opposite.

Mr. EGGER. I know of no one in the IRS that stands for that.

Mr. JACOBS. I don't know about anyone. I am talking about not who but what. I am talking about the policy. The IRS is a what, not a who, and you are known by your policies. Actions speak louder than words.

I add to what Mr. Rangel said. I am persuaded that I am right in admiring you as a reasonable public official yourself, sir.

Mr. SHANNON. Mr. Egger, did you have any discussions prior to January 8 with anybody in the administration outside of the Internal Revenue Service about this pending decision?

Mr. EGGER. Well, I was involved in a number of meetings that included people from the Department of Justice.

Mr. SHANNON. Anybody from the White House?

Mr. EGGER. No.

Mr. SHANNON. Anybody from the Treasury Department, Treasury and Justice?

Mr. EGGER. Secretary McNamar, Peter Wallison, his deputy, people from the tax policy area.

Mr. SHANNON. What was your advice to them?

Mr. EGGER. My position was as stated here, I believed the case should go forward. I believed the Supreme Court should rule on the issues, for our guidance.

Mr. SHANNON. It was sufficient legal authority for you to maintain those regulations, pending the decision by the Supreme Court?

Mr. EGGER. I believed so.

Mr. SHANNON. Thank you very much.

Chairman ROSTENKOWSKI. Mr. Martin will inquire.

Mr. MARTIN. Thank you very much.

I want to thank my colleague from Indiana for helping to clarify the vote on the parties opposed to social security benefits. I would ask the Commissioner whether the basis for the regulation for exempting social security benefits from taxation is based on the ruling by the U.S. Supreme Court regarding the constitutionality of the social security legislation?

Mr. EGGER. Since I am personally not familiar with that, Mr. Martin, I am going to ask my attorney here if he has a comment on that.

Mr. GIDEON. I would like——

Mr. MARTIN. I would say you are planning to look into that in response to Mr. Rangel's question. I would be delighted if you would share a copy or send a letter at the same point.

Mr. EGGER. Certainly.

Mr. MARTIN. I note that you indicate that Secretary McNamar was correct when he summarized your position which was to prefer to go forward with the case. Nevertheless, as I understood some of your statement, you have given a rather thoughtful statement of the dilemma that faces the Government in going or not going forward with it.

Apparently you viewed two sides of it, as indeed there can be, that need to be dealt with. Are you a lawyer? I am not.

Mr. Egger. Yes, I am.

Mr. Martin. I don't hold that against you.

Mr. Egger. That is good. Some of my best friends are lawyers.

Mr. Martin. Do you have any ideal reaction as to what kind of lawmakers should come here and characterize the issue as having only one side and anyone else who would disagree with them would flunk their course.

Is that how your law school was conducted?

Mr. Egger. The obvious answer to that is that they are persuaded by case law that that is the answer.

I am persuaded that the weight of authority in the case law is in that direction. However, the biggest dilemma is not free from doubt. There are many lawyers and judges who have taken fairly sharp positions to the contrary.

Nevertheless, I felt that the easiest way to resolve it was in the courts.

Mr. Martin. You would feel that if you were teaching law, that you would not flunk students just because they disagree with your conclusions about case law?

Mr. Egger. Right.

Mr. Martin. We had a question of censure raised here earlier and I think that has kind of died on the vine, but do you see any basis for that from what you heard here today?

Do you have any idea why Professor Tribe would come here and pose such a thing?

Mr. Egger. No, I do not know Professor Tribe. I heard his testimony today and I wasn't quite sure what the grounds were.

Mr. Martin. You might call that diatribe.

Mr. Conable. Now come on.

Mr. Martin. Aside from the questions of how we got here, and aside from the questions of how we get out of here——

Mr. Conable. Or whether.

Mr. Martin. Do you support the legislation on its merits which Mr. Conable I believe has introduced on behalf of the administration as a courtesy to the administration?

Do you find it workable in the way it differentiates theological seminaries?

Mr. Egger. I guess the first question is that my reading of that proposed legislation is that it would put us, in the case of the primary and secondary schools, in the same posture as we were prior to January 8, with respect to the issue of race discrimination.

So in that sense I do not see it as any material change. That is to say, changes in results.

Mr. Martin. Would it be helpful?

Mr. Egger. Oh, yes, it certainly would be helpful to get us out of this dilemma at this point.

Mr. Martin. So you would support it?

Mr. Egger. Certainly.

Mr. **Martin**. With regard to differentiation of theological seminaries, does that pose a problem as for example, a school that might go from kindergarten through theological seminary? Is that a workable——

Mr. **Egger**. As I understood it, the section in there with regard to admissions preference or priorities, on the basis of membership or belief in the particular religion, would still not permit discrimination on the basis of race.

Mr. **Martin**. So you think it would be a workable position.

Mr. **Egger**. Yes.

Mr. **Martin**. Thank you very much.

Mr. **Bailey**. Commissioner, you may have been asked this question so forgive me if I am redundant, but the relationship between you and Justice would not require you to—or would it—to follow the recommendation from them that you comply with their interpretation of law?

In short, are you going to continue denying tax exempt status? I would hope that you would, if you can.

Mr. **Egger**. Mr. Bailey, the Internal Revenue Code confers the authority on the Secretary of the Treasury, to whom I report, so that the ultimate decision in a matter of that importance lies with the Secretary of the Treasury.

Now, the relationship between our agency and the Justice Department is that they are counsel to or attorneys for our agency along with other—many other—agencies in the Government. So in a sense there is no direct line. We would not necessarily be required to follow a recommendation of the Justice Department.

Mr. **Bailey**. That is right.

Mr. **Egger**. However if the Treasury Department, as in this case, made a policy decision, then that is the final word.

Mr. **Bailey**. So Secretary Regan will be giving you marching orders on whether you are going to follow what certainly has been an opinion on the part of those attorneys in Justice?

Mr. **Egger**. That is correct. The Secretary of the Treasury is the authorized officer under the law, and he merely delegates certain portions to the Commissioner of the Internal Revenue.

Mr. **Bailey**. Thank you, Commissioner. What is your personal reading of the law? Do you think that there was sufficient congressional intent demonstrated in existing law to indicate what our desires are?

Mr. **Egger**. I have to tell you that I think the statute itself is relatively vacant of any clear indication of congressional intent. However, I believe there is adequate case law to move forward with this litigation, as I have said.

Mr. **Bailey**. Adequate case law and, of course, your practice, which has been implemented for a number of years. There is also no question in your mind that the intent and purpose of the so-called Ashbrook or Dornan amendments or whatnot were due to the fact that there was a very heavy paperwork burden, a requirement to come forth on the part of schools and prove, in fact, that that was the intent of those amendments, whether they were well written or not. I think we had some testimony earlier that there were some doubts about the intent of those amendments and they didn't want you to enforce that policy.

I don't think that is true. I don't remember the debate that way. Could you help me with your memory?

Mr. **Egger**. My first reaction to those amendments was that they were intended to stop the Internal Revenue Service from implementing the procedures which at least in those days were outlining the procedures for——

Mr. **Bailey**. For a claimant or taxpayer to follow?

Mr. **Egger**. In the determination of whether that institution did practice discrimination.

Mr. **Bailey**. They were not meant to imply that you or Justice were interpreting congressional intent differently as to discrimination and the exemption procedure. And they certainly never made any attempt to deny the rights of a litigant to try to enforce or try to encourage Justice or to bring a case on their own behalf to prevent tax-exempt status for a school that did practice discrimination.

In other words, they never attempted to interfere with anyone's rights to bring an action, to deny tax exempt status to someone who discriminated as a matter of course?

Mr. **Egger**. Well, I suppose the most recent version causes me some confusion, I must say, because of the limitation as to court order as well as to our own revenue procedures.

I am not sure which way is out of that dilemma, and I wish it weren't there, but other than that I think basically what you said is true.

Mr **Bailey**. You have not received an order from Secretary Regan yet in this regard?

Mr. **Egger**. To?

Mr. **Bailey**. Concerning your policy in these matters?

Mr. **Egger**. We certainly have been directed by the Secretary or the Deputy to go forward with the revocation of the revenue rulings and procedures which form the basis for our heretofore position.

Mr. **Bailey**. You have been already?

Mr. **Egger**. Certainly.

Mr. **Bailey**. You have?

Chairman **Rostenkowski**. Mr. Anthony will inquire.

Mr. **Anthony**. Thank you, Mr. Chairman.

Commissioner, I would like to follow up on that. How long will it take the IRS to comply with the Secretary of the Treasury's mandate to withdraw those regulations and in fact grant the tax exemption to Bob Jones University and Goldsboro Christian Schools?

Mr. **Egger**. In the case of the exemptions, the cases are rather old. In the case of Bob Jones, the last tax year that is involved in the court proceeding is 1975. It would be necessary for us in any case—and this would be true whether it was in this instance or in another case where a court had reversed our finding—it would be necessary for us to proceed to look at the interim period to make certain that the institution qualified in other respects. So it will take some time, including possibly obtaining some information from the institutions and so on. So there is a normal natural procedural period here. I cannot give you specifics on it.

Mr. **Anthony**. What would be a rough estimation?

Mr. EGGER. I do not know. Possibly some weeks, maybe even a month or so. It is hard to say.

Mr. ANTHONY. Some weeks, maybe a month?

Mr. GIDEON. That would also depend on the institution's response to some of the requests for information.

Mr. EGGER. Right.

Mr. GIDEON. In other words, that is procedural. It would happen in due course.

Mr. ANTHONY. Since the decision has been made and you have already been—I think that was January 8——

Mr. GIDEON. Right.

Mr. ANTHONY. That you got that instruction. I understand that Justice has filed a lawsuit for you claiming back tax that Bob Jones University has failed to pay. I understand they just paid a minimum amount so they could get a standing to sue in court, and that you now have a suit going claiming back taxes.

Mr. GIDEON. That is the same lawsuit. In other words, when Bob Jones filed its suit, we filed a counterclaim.

Mr. ANTHONY. You counterclaimed, so it is all tied up in the same suit.

Mr. GIDEON. The same suit in both cases, *Bob Jones* and *Goldsboro.*

Mr. ANTHONY. So when that case is eventually disposed of, that particular part of your counterclaim would be disposed of at the same time?

Mr. GIDEON. That is correct.

Mr. ANTHONY. It would be handled together?

Mr. GIDEON. Right.

Mr. ANTHONY. Thank you. I yield back the balance of my time.

Chairman ROSTENKOWSKI. Mr. Commissioner, thank you very much for joining us. I want to thank the members of the committee for their deliberations. I also want to make some observations as we close.

Much of the testimony given today certainly troubles quite a few of us on the committee. Personally, I am struck by the carelessness or the naivete with which the administration reversed longstanding civil rights law.

Clearly, they chose to ignore a substantial body of law that has guided Federal policy against discrimination under both Democratic and Republican administrations over the past 12 years.

Testimony today raises fundamental doubts concerning this administration's intent on executing laws developed by Congress and the courts. The law of the land is not erased when administrations change. The law—in this case, the law against racial discrimination in private schools—transcends political changes in Washington. The executive branch cannot ignore the body of law developed by the Congress and legal precedents established by the judiciary. Only the Supreme Court can overturn the decisions of other courts, and only the Congress can change the statutes which reflect earlier policy decisions.

I think the majority of members on this committee find it hard to believe the decision which confronts such a fundamental legal and moral standard in this country was reached over a period of 3 weeks, and based on an after-the-fact legal analysis of such dubious scholarship. We have no evidence that a legal case for the decision was made before January 5, the same day a memorandum reveals the public relations strategy for releasing the policy change so as to escape early criticism in the media.

Nor is there evidence that the administration's case was in any way shaped by attorneys in the Tax Division of the Justice Department or the Treasury Department, or even in the Civil Rights Division of the Justice Department, all traditional sources of legal judgment within every administration. Instead, the legal justification for ignoring years of antidiscrimination rulings all the way to the Supreme Court was prepared by special assistants to the Attorney General and Assistant Attorney General for Civil Rights. Indeed, they reflect a very selective memory regarding various legal precedents and legislative history over the last 12 years.

Existing law as enacted by the Congress and as interpreted by the courts is very clear. It denies tax exemptions to private schools that practice racial discrimination. Many of us then are unconvinced as to why this administration is asking for additional legislation and "clear" statutory authority.

The testimony presented to this committee today by the panel of legal scholars compels us to find no justification for the position of the administration that additional legislation is necessary.

I strongly urge the administration to review the existing body of law—to withdraw its position on this issue—and to conclude that the law is clear and must be faithfully executed. Of equal importance, the administration must take the action necessary to let the Supreme Court hear the cases of *Bob Jones University* and *Goldsboro* on the merits.

Mr. CONABLE. Mr. Chairman, I do not quarrel with the conclusion you come to here. Is this an announcement that there will be no markup?

Chairman ROSTENKOWSKI. No. The Chair will decide what further steps we will take. I think the Chair is going to wait for some reaction from the administration.

Mr. CONABLE. I see. You feel that on the basis of this hearing then the answer is that the Congress has no interest in legislating in this area?

Chairman ROSTENKOWSKI. I think the Chair will react to whatever the administration wants to discuss with him in the near future.

Mr. CONABLE. I thank the gentleman for clarifying that.

[Whereupon, at 6:25 p.m., the hearing was adjourned.]

[The following was submitted for the record:]

STATEMENT OF HON. GARY HART, A U.S. SENATOR FROM THE STATE OF COLORADO

Mr. Chairman, I appreciate the opportunity to submit a statement for the record as you begin your hearing on the issue of tax-exempt status for private schools that practice racial discrimination.

The Administration's confusing policy reversals on this issue over the last few weeks have been unfortunate and unnecessary. They represent an insensitivity not only to the law and progress made on civil rights in the last quarter century but more important, an insensitivity to the fundamental moral values which have been the foundation for such progress. The new statute which President Reagan has now proposed only adds further to the unnecessary confusion.

Current Federal law is clear. As the U.S. Commission on Civil Rights has pointed out, the Constitution, Title IV of the Civil Rights Act, and the Internal Revenue

Code authorize, indeed require the IRS to deny tax-exempt status to private schools which discriminate on the basis of race. The courts have already interpreted Federal law in this manner.

For this reason, I have introduced Senate Concurrent Resolution 59, with Senator Durenburger, Senator Moynihan and 26 other cosponsors. This resolution will put the Congress firmly on record against tax-exempt status for private schools that practice racial discrimination. The concurrent resolution states the sense of the Congress that current Federal law clearly authorizes and requires the Internal Revenue Service to deny tax-exempt status and deductibility of contributions to private schools that discriminate on the basis of race.

Mr. Chairman, I hope the House of Representatives will consider a similar resolution as an alternative to the Administration's legislation. The point which this resolution makes about the adequacy of current Federal law reflects the view of the U.S. Commission on Civil Rights and a number of civil rights organizations. By adopting this resolution Congress would make a strong statement that current Federal law is, and has been, clear on mandating the tax-exempt status be denied to private schools that discriminate on the basis of race.

Again, I appreciate the Chairman providing me the opportunity to submit this statement, and I ask that a copy of Senate Concurrent Resolution 59 be included in the hearing record.

STATEMENT OF HON. TOBY MOFFETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. Chairman and Members of the Committee, thank you for the opportunity to present testimony before you today on the reversal of the Internal Revenue Service tax-exempt school ruling. It is very evident that President Reagan's recent actions on allowing—and then seemingly disallowing—tax exemptions for private schools which discriminate on the basis of race have galvanized the nation's moral conscience. It is heartening that the public has voiced its outrage and concern about this matter. Hopefully, our vehement response to the President's actions will result in the clarification of the IRS Revenue Ruling, and the Service's continuing and unaltered authority to withhold tax-exempt status from private schools which discriminate against minority students. Today's hearings will set us on the appropriate path to this goal.

I do not intend to take up much time this morning, for I am anxious to hear from the legal experts and the Administration on the cause for the policy reversal and the subsequent "remedying" legislation submitted by the President. However, I must add my voice to those who concur that the IRS Revenue Ruling, issued in 1971, correctly interpreted all federal court findings and the intent of Congress in prohibiting tax exemptions for racially discriminatory schools.

The definition of what constitutes a charitable organization can in no way encompass practices of racial bias. Title VI of the Civil Rights Act prohibits racial discrimination in federally assisted programs. The federal court system, including the Supreme Court, has determined repeatedly that the Constitution and the Civil Rights Act support a national policy of desegregated education. Three previous Administrations have observed this policy. All the facts add up to ample authority of the IRS to consider ineligible for tax exemptions private schools which discriminate on the basis of race. With such ample authority, legislation to codify the clear meaning of the law is duplicative and simply unwarranted.

We have heard the Administration pledge itself with respect to civil rights, but its actions demonstrate indifference and often hostility to concrete civil rights initiatives. When President Reagan transmitted his "remedying" legislation on tax-exempt schools, he wrote:

"I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and its citizens hold dear, and I believe this repugnance should be plainly reflected in our laws."

Colorblindness must have prevented him from seeing that this repugnance to discrimination is already reflected in our laws, which is why we have affirmative action programs, busing efforts, and voting rights legislation.

Codification legislation is not necessary to cure the problem of the IRS policy reversal. The President must admit the painfully obvious. He has made a mistake. Now he must undo that mistake, before equal opportunity in America becomes a victim to it, by embracing the original Revenue Ruling.

Let me close with one thought. After having participated actively in the Civil Rights Movement; after watching, with great pain and sadness, dogs unleashed on civil rights demonstrators in the South; after struggling for progressive, anti-discrimination legislation in the Congress, and seeing it enacted into law; and after having seen progress toward racial unity and understanding, it was almost incomprehensible to me that the Administration would permit backsliding on this fundamental issue. Regardless of what approach to today's problem this Committee chooses to pursue, let one thing remain clear: the Congress of the United States must never, ever permit racial discrimination to be practiced as the official policy of our government again.

JOINT STATEMENT RE THE TAX EXEMPT STATUS OF PRIVATE SCHOOLS

[This statement is signed by the following:]

M. **BERNARD AIDINOFF**, *New York, N.Y.*
DONALD C. ALEXANDER, *Washington, D.C.*
MAC ASBILL, Jr., *Washington, D.C.*
HUGH CALKINS, *Cleveland, Ohio*
MORTIMER M. CAPLIN, *Washington, D.C.*
M. **CARR FERGUSON**, Jr., *New York, N.Y.*
CHARLES O. GALVIN, *Dallas, Tex.*
MARTIN D. GINSBURG, *Washington, D.C.*
ERWIN N. GRISWOLD, *Washington, D.C.*
JOHN JONES, *Washington, D.C.*
JEROME KURTZ, *Washington, D.C.*
JAMES B. LEWIS, *New York, N.Y.*
HARRY K. MANSFIELD, *Boston, Mass.*
JOHN S. NOLAN, *Washington, D.C.*
JOHN S. PENNELL, *Chicago, Ill.*
LIPMAN REDMAN, *Washington, D.C.*
JOHN E. SCHEIFLY, *Los Angeles, Calif.*
SHERWIN P. SIMMONS, *Tampa, Fla.*
WILLIAM H. SMITH, *Washington, D.C.*
ROBERT D. TAICHERT, *Albuquerque, N. Mex.*
THOMAS D. TERRY, *San Francisco, Calif.*
IRWIN L. TREIGER, *Seattle, Wash.*
BERNARD WOLFMAN, *Cambridge, Mass.*

On January 8, 1982 the Treasury Department announced that organizations which otherwise qualify as exempt for federal income tax purposes will not lose or be denied their exempt status on the grounds that they "don't conform with certain fundamental public policies". Accordingly, the announcement stated, the Department of Justice had filed a Memorandum in the United States Supreme Court on that date "to vacate" the pending case involving Goldsboro Christian Schools and Bob Jones University (Nos. 81-1 and 81-3) because of mootness, since the Internal Revenue Service proposed to restore the tax exempt status to those two schools. The announcement stated also that that action was based on "the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history.[1]

We disagree strongly with that advice. We believe that the law is clear that the Commissioner of Internal Revenue has the right, and indeed the duty, to deny tax exemptions to private schools which practice racial discrimination. We believe also that current circumstances require our public declaration to this effect and to the further effect that the Internal Revenue Service has the obligation to continue to enforce that rule without interruption.

Section 501(c)(3) defines those organizations of a charitable nature which are exempt from tax on their income; deductibility of contributions to such organizations is determined under Section 170(c)(2). There is nothing new about the Commissioner's obligation to monitor the activities of all (c)(3) organizations to determine their qualification for receipt and retention of the relevant tax benefits. Nor is there anything new about the Commissioner's frequent activity in this general area and more particularly with regard to tax exempt schools.

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[1] Although subsequent announcements (on Jan. 18, 1982) by the White House and the Treasury Department deal with this subject, they do not question the soundness of this advice or its critical role in the current discussion.

In terms of recent years, the Commissioner's effort took the form of IRS News Releases of July 10 and 19, 1970, which were followed by Revenue Rulings 71-447 and 72-54. The purpose of all of these pronouncements was to articulate the basic requirement that tax exemption required private schools to operate in all respects in a manner which did not discriminate on the basis of race, color, or other elements of ethnic origin.

These rulings were issued in the context of judicially ordered desegregation of public schools through the country and the related attempt to satisfy the educational requirements of some segments of the population by the establishment of private schools. It was in that context that various court decisions confirmed the long-standing principle that an organization which operates illegally or in a manner contrary to public policy is not "charitable" and therefore not entitled to Federal income tax exemption. *Ould* v. *Washington Hospital for Foundlings,* 95 U.S. 303 (1877); *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108 (C.A. 3 1941). In view of the well defined public policy against racial discrimination reflected in the Civil Rights Act of 1964 and cases such as *Brown* v. *Board of Education,* 347 U.S. 483 (1954), and *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971), courts have applied the above described principle over the past several years to deny tax exemption to private schools which practice racial discrimination.

The leading case is the decision of the three-judge court in *Green* v. *Connally,* 330 F. Supp. 1150 (D.D.C. 1971), aff'd. per curiam, 404 U.S. 997 (1971). Since that time, the Supreme Court has decided that schools which discriminate on basis of race are not entitled to certain governmental, non-tax benefits [2] and two Courts of Appeals have denied tax exemption to schools which engage in racial discrimination.[3]

The significance of the Supreme Court affirmance in the *Green* case has been questioned by some on the basis of a footnote in a 1974 Supreme Court decision [4] where the Court noted that the *Green* v. *Connally* decision "lacks the precedential weight of a case involving a truly adversary controversy." Although that comment was truly dictum to the issue before the Court, considerable stress is placed on the footnote by those who contend that the Supreme Court has not "really" decided the basic question—all the more reason therefore not to attempt to moot the issue now pending before that Court in the Bob Jones University and Goldsboro Christian Schools cases.

In addition subsequent developments clearly establish the understanding of other courts and the Congress that the law requires that private schools that discriminate are not entitled to tax exemption.

1. As noted above (footnote 3), these have been three appellate court decisions since the Green case affirmance by the Supreme Court, and all of them have stated that clear rule.

2. On two relatively recent occasions, Congress itself has indicated its understanding that the law requires denial of tax exemption to schools which discriminate.

a. The first appears in connection with P.L. 94-568 which was enacted October 29, 1976, to add Section 501(i) to the Code, denying tax exemption under Section 501(c)(7) to social clubs which practice racial discrimination. In making that change, the Finance Committee (Senate Report No. 94-1318, 1976-2 C.B. 601) made clear the congressional intention to overrule the Federal District Court decision in *McGlotten* v. *Connally,* 388 F. Supp. 448 (D.D.C. 1972) which allowed tax exemption to social clubs even though they discriminate. In explaining that purpose the Committee report made equally clear the congressional intent to treat the Supreme Court decision in *Green* v. *Connally* as the law applicable to private schools, i.e., that tax exemption is not available to such schools which practice racial discrimination. The Committee report goes on to say that the purpose of the new provision regarding social clubs was to bring them into line with "national policy" against racial discrimination. Since Congress understood *Green* v. *Connally* to establish the rule that private schools which practice racial discrimination are not entitled to tax exemption, there was no need to make any change in the Code with respect to Section 501(c)(3) organizations.

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[2] *Runyon* v. *McCrary,* 427 U.S. 160 (1976) (the 1866 Civil Rights Act (42 U.S.C. § 1981) prohibits racial discrimination in nonpublic school admission policies); *Norwood* v. *Harrison,* 413 U.S. 455 (1973) (a Mississippi law which provided for text books and transportation to students attending private schools which practiced racial discrimination was invalid); *United States* v. *Mississippi,* 499 F. 2d 425 (C.A. 5, 1974); *Graham and United States* v. *Evangeline Parish School Board,* 484 F. 2d 649 (C.A. 5, 1973); *United States* v. *Tunica County School District,* 323 F. Supp. 1019 (N.D. Miss.) aff'd 440 F. 2d 377 (C.A. 5, 1971). See also *Brumfield and United States* v. *Dodd,* 425 F. Supp. 528 (E.D. La. 1976), enjoining a state program for text books and transportation aid similar to the one considered in *Norwood.*

[3] *Bob Jones University* v. *U.S.,* 639 F. 2d 147 (C.A. 4 1980), rehearing and rehearing *en banc* denied Apr. 18, 9181), cert. granted—— U.S. —— (Oct. 13, 1981); *Goldsboro Christian Schools, Inc.* v. *U.S.,* 436 F. Supp. (E.D.N.C. 1977), aff'd in an unpublished opinion (C.A. 4, Feb. 24, 1981), cert. granted—— U.S. ——(Oct. 13, 1981). As noted, these are the cases in which the Department of Justice filed its Jan. 8, 1982 Memorandum. See also *Prince Edward's School Foundation* v. *U.S.,* 478 F. Supp. 107 (D.D.C. 1979) aff'd by unpublished order No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied 450 U.S. 944 (1981).

[4] In *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974), the Court held that the Anti-Injunction Act barred the use of an injunction to contest the revocation of tax exemption.

b. In connection with recent appropriations bills for the Treasury Department, Congress has again stated its clear understanding that current law requires denial of tax exemption to schools which discriminate. In enacting appropriations for fiscal year 1980,[5] (Public Law 96-74, 93 Stat. 559) Congress specifically (Sections 103 and 615) barred the use by the Internal Revenue Service of any funds to implement certain guidelines regarding the tax exempt status of private schools proposed by the Commissioner of Internal Revenue in August, 1978 and February, 1979. But in so doing, the sponsors of the limitation made clear that there was no doubt about the power of the Commissioner under pre-1978 pronouncements to deny tax exempt status to schools which discriminate and that their concern was limited to the way the Commissioner proposed to exercise the power.[6]

Against this background, it is difficult for us to believe there is any doubt about the power—and again, the duty—under the law as it exists today, of the Commissioner of Internal Revenue to deny tax exemption to schools which discriminate.

It is equally difficult to understand the assertion that one important reason for the current legislative proposal is to eliminate "administrative fiat"[7] in the administration of the tax laws. We suggest that no provision of the Internal Revenue Code can—or indeed should be so detailed as to eliminate the need for discretion and judgment in the administration of the Internal Revenue Code. The January 18, 1982 proposal may well prove to be desirable, even if enacted in its present form, it will not significantly narrow the area of the Commissioner's (and revenue agents') discretion. Furthermore the pendency of the January 18 proposal should have no effect on the uninterrupted actions of the Commissioner in continuing to deny tax exemption to all schools which discriminate—including Bob Jones University and Goldsboro Christian Schools.

The litigation instituted by those schools demonstrates that the Commissioner's enforcement activities will inevitably produce conflict since there will of course be disputes in particular situations involving specific facts and circumstances. It is for example not unreasonable to express concern about certain Constitutional questions as to schools whose discriminatory practices stem from religious beliefs. We believe that the answer to those questions is best left to the courts,[8] and for that reason, we are particularly distressed over the effort to moot the *Bob Jones University* and *Goldsboro Christain Schools* cases pending in the Supreme Court—especially after the Solicitor General of the United States advised the Court (pages 15 through 17, Brief For the United States) that the petitions for certiorari by the two schools were not being opposed because of "the substantial public importance to both the [Internal Revenue] Service and the institutions involved."

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[5] Similar limitations were enacted by continuing resolutions as to fiscal years 1981 and 1982. Public Law 96-536, 94 Stat. 3166; Public Law 97-51, 95 Stat. 958; Public Law 97-85 (November 1981) and Public Law 97-82 (December 1981). Many of us objected strenuously to this legislative technique as "a form of legislation by negative veto" in our July 23, 1979 letter to Senator Warren G. Magnuson.

[6] In presenting his amendment (which became Section 615 of Public Law 96-74), Representative Dornan stated (125 Cong. Rec. H5982, July 16, 1979, daily ed.): "Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50."

In submitting the amendment which became Section 103, Representative Ashbrook stated (125 Cong. Rec. H5879, 5882, July 13, 1979, daily ed.): "My amendment very clearly indicates on its face that all the regulations in existence as of Aug. 22, 1978, would not be touched." "My colleagues surely know that existing revenue procedure 7550 [sic] would be in effect."

The Ashbrook amendment was later introduced in the Senate by Senator Helms who stated (125 Cong. Rec. S11979, Sept. 6, 1979, daily ed): "Under my amendment, the IRS may still move to withdraw the tax exemption status of a school which has failed to meet the standards of Revenue Procedure 75-50" and "In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools in a case-by-case basis."

[7] Statement of Edward C. Schmults, Deputy Attorney General, p. 7, and Statement of R. T. McNamar, Deputy Secretary of the Treasury, p. 6, both before the Senate Finance Committee, Feb. 1, 1982.

[8] Indeed the need for and the form of legislation may well be significantly affected by the Court's decision in those cases. Accordingly it is clearly desirable to defer legislation pending that decision.

It appears to us as extemely unwise to attempt to abort the Supreme Court's consideration of such an important issue on the basis of a contention—uncertainty in existing law—which we believe to be wholly unsupportable. Perhaps most difficult of all to understand is the justification of this effort, at this stage of those cases; even if current law were uncertain,[9] that is precisely the situation in which the Supreme Court should be allowed to proceed with its normal review.

SUMMARY

1. Current law is clear that private schools which discriminate are not entitled to federal income tax exemption.
2. Regardless of the merits of the January 18, 1982 legislative proposal, that proposal's pendency should have no effect on the uninterrupted enforcement of the law by the Internal Revenue Service.
3. Unless the Supreme Court reverses the current decisions of the Court of Appeals for the Fourth Circuit, Bob Jones University and Goldsboro Christian Schools are not entitled to tax exemption. Accordingly, the Department of Justice should withdraw its January 8, 1982 Memorandum in the Supreme Court in the cases involving those schools and permit the court to consider the merits of the question.
4. There should be no consideration of any legislative proposal pending the Supreme Court's decision in those cases.

Respectfully submitted.

STATEMENT OF PROF. ROBERT A. GORMAN, UNIVERSITY OF PENNSYLVANIA SCHOOL OF LAW, PRESIDENT, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

The American Association of University Professors, an organization of some 70,000 members, has since 1915 been the principal spokesman on matters of concern to college and university faculty throughout the United States.

For many years, the Association has formally decried race discrimination in American institutions of higher education. At its Forty-Second Annual Meeting in 1956, the Association called upon privately supported colleges and universitites to adhere to the principles announced in court decisions outlawing racial segregation in the public sector. It declared that "free access to every kind of educational opportunity, measured only by the aptitude and achievement of the individual teacher or student, must be safeguarded to all Amerians, of whatever race. Any interference with such access imperils the right of the teacher to teach, as well as the right of the student to learn."

An institution that discriminates against racial minorities in faculty or student recruitment undermines the conditions of academic freedom. It also violated civil rights statutes as construed by the United States Supreme Court. It has been authoritatively determined, moreover, that existing provisions of the Internal Revenue Code give to the federal government not only the power but also the obligation to deny tax-exempt status to institutions that engage in racial discrimination.

The American Association of University Professors condemns any action by the Administration which retreats from this commitment to the full enforcement of the controlling civil rights and taxation laws. The failure to press vigorously the pending Supreme Court cases against Bob Jones University and Goldsboro Christian School, and the suggestion that new legislation is necessary to authorize the Internal Revenue Service to deny tax-exempt status to these and similar institutions, are unwarranted and untenable.

The laws that strip from racially discriminatory schools the claim to "charitable" status are already on the books. By enforcing those laws, and by pursuing the two cases now pending before the Supreme Court, the Administration can reaffirm a principle which is both essential to the integrity and quality of American higher education and a cornerstone of our legal and ethical heritage.

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[9] This difficulty is compounded by the obvious conflict between (a) the effort in the Jan. 18, 1982 legislative proposal to deny tax exemption to such schools as Bob Jones University and Goldsboro Christian Schools and to do so on a retroactive basis, and (b) the representations to the Supreme Court that tax exemption was being restored to those two public schools and that the Revenue Service was rescinding its published rulings which provide the basis for revoking those exemptions in the first place. Many of us have serious concerns about retroactive tax legislation, from both the policy and constitutional points of view.

STATEMENT OF JOHN S. NOLAN, CHAIRMAN, SECTION OF TAXATION, AMERICAN BAR ASSOCIATION

This statement is submitted by John S. Nolan, Chairman of the Section of Taxation of the American Bar Association on behalf of the Section but not on behalf of the Association or any other part thereof. In the interests of avoiding repetition, we have attempted to confine our comments to aspects of the school exemption issue within the special expertise and concern of tax lawyers.

It is the position of the Section of Taxation that:

1. Present law is clear, without further action by Congress, that tax exemption under Section 501(c)(3) must be denied to schools that operate on a racially discriminatory basis.
2. Legislation with respect to Section 501(c)(3) that merely restates law that is already clear is unnecessary. To the extent that legislation imposes burdens retroactively on taxpayers who are not covered by existing law, such action violates fundamental rules of fairness and justice.
3. It is premature for Congress to legislate before the Supreme Court has taken action in the pending *Bob Jones* and *Goldboro* cases, as such action could moot or change the need for legislation.
4. At the present time, the Section of Taxation opposes any action beyond a joint resolution by Congress supporting and ratifying the interpretation of law by the Internal Revenue Service and the courts. No more formal legislation should be enacted until the Supreme Court acts on the pending cases.

1. THE LAW

Green v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), aff'd per curiam, 404 U.S. 997 (1971), squarely establishes that the Internal Revenue Service has not only the right but the duty to deny tax exemption to racially discriminatory schools. This has been followed in *Bob Jones University* v. *United States*, 639 F.2d 147 (4th Cir. 1980), rehearing and rehearing en banc denied April 18, 1981; *Goldsboro Christian Schools, Inc.* v. *United States*, —— F.2d —— (4th Cir. 1981); and *Prince Edwards's School Foundation* v. *United States*, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order No. 79-1622 (D.C. Cir. June 30, 1980), cert, denied, No. 80-484, February 23, 1981.

There is no contrary authority. In its October 1981 brief on petition for certiorari, the United States correctly conceded the correctness of these decisions. The point primarily at issue before the Supreme Court in the current cases is whether a First Amendment claim would override the *Green* rule and permit racial discrimination based on religious grounds. It would be helpful to all concerned to have this issue resolved.

Congress in effect ratified *Green* v. *Connally* in 1976 in adding Section 501(i) to the Internal Revenue Code to apply a prohibition against discrimination to social clubs after a District Court decision (*McGlotten* v. *Connally*, 388 F. Supp. 448 (D.D.C. 1972)) went the other way. Indeed, Congressional proponents of recent action restricting expenditure of appropriated funds in support of expanded 1978 guidelines were careful to announce they were not attacking pre-1978 rulings implementing *Green* v. *Connally*. See, e.g., 125 Cong. Rec. H5879, 5882 (daily ed. July 13, 1979); 125 Cong. Res. H5982 (daily ed. July 16, 1979).

Against this background, it cannot be seriously asserted that there is any doubt about the power and duty under the law as it exists today, to deny tax exemption to schools which discriminate.[1]

2. RETROACTIVE TAX LEGISLATION

As shown in the attached Exhibit A, it has been a long-standing principle of the Section of Taxation that retroactivity of tax legislation beyond the current year is undesirable. In general, Congress has followed the same rules. With respect to Section 501(c)(3), there is no need for Congress to venture into the thicket of retroactivity. The law with respect to tax exemption for racially discriminatory schools is clear. Enactment of retroactive legislation can only add confusion. To the extent that there are problems that require resolution, they can best be handled on a prospective basis after the Supreme Court deals with the pending case.

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[1] In its Description of S. 103 and S. 449 Relating to Tax Exempt Status of Private Schools (JCS-13-79, Apr. 26, 1979), the Staff of the Joint Committee on Taxation advised Congress that "the illegality of granting tax exemption to racially discriminatory private schools generally is acknowledged" (p. 25).

3. POSSIBLE SUPREME COURT ACTION

The Supreme Court may decide to hear the *Bob Jones* and *Goldsboro* cases despite the Government's present decision not to argue applicable law or may take other steps which would materially change the legislative situation. Congress should not rush to take action which may be unnecessary. The waiting period would permit more deliberate consideration of the difficult details of legislation in such a sensitive and difficult area.

4. JOINT RESOLUTION

Under existing circumstances, a joint resolution by Congress supporting the existing interpretation of Section 501(c)(3) that schools operating on a racially discriminatory basis are not entitled to tax exemption would be appropriate. No additional legislation is necessary at this time.

EXHIBIT A

AMERICAN BAR ASSOCIATION, SECTION OF TAXATION

RESOLUTIONS HAVING CONTINUING EFFECT

1. * * *

2. *Resolved.* That the Section of Taxation adopts the following set of principles for guidance of the Council and committees, with respect to retroactive revenue legislation:

1. Retroactive imposition of tax liability is undesirable. Such action should generally be opposed whether a large or small segment of the tax-paying public would be affected.

2. Retroactivity limited to the current year may be justified in such matters as rates or personal exemptions which are not likely to influence taxpayer conduct. On the other hand, a retroactive tax is in principle not justifiable on the ground that existing law afforded a "loophole" or "unintended benefit." Nor is it material that the "loophole" is contrary to an established administrative policy and has been disclosed only recently by a generally unexpected court decision. In the area of so-called "technical" amendments, there is no objection to retroactive amendments which can be properly characterized as "clerical," "typographical" or "grammatical," but this does not extend to substantive amendments which are stated to "clarify" or "reflect" a supposed "Congressional intent" under the existing statute.

3. Retroactivity is determined with reference to the date upon which the amendment beomes law. It is reognized that in some cases publicity attendant upon a proposed amendment may induce taxpayers to take advantage of an existing "loophole." Nevertheless, the foreclosure of such last-minute tax avoidance is considered less important than the preservation of the principle that a taxpayer may rely upon an existing statute in planning his affairs.

4. A change in the current tax treatment of an item attributable to a transaction completed in a prior year may involve factors akin to retroactivity. One example is the taxation of the current installments of a previously consummated installment sale. Another example is the taxation of the current income of a trust created in a prior year. In determining whether retroactivity in this borderline area is justified, the factor of taxpayer reliance upon prior law should be balanced against such factors as equality among taxpayers and administrative convenience.

5. In the case of "relief" legislation, the considerations involved in fixing effective dates are quite different from those in the case of amendments which impose or increase a tax. The basic consideration in relief cases is Congressional discretion in determining whether there should be a remission of an unwarranted exaction under existing law, and such a determination will not normally be subject to adverse criticism. On the other hand, the Section should continue its long-established policy of not making any affirmative recommendation for retroactive relief except in the rare case involving extreme inequity.

6. If a provision is considered in the nature of "relief" to the majority of taxpayers affected, but if it may adversely affect some other taxpayers, it should not be made retroactive unless an election is afforded to avoid any adverse effect.

7. When prior law is doubtful, the existence of even a prospective amendment will often have some effect upon judicial interpretation of that prior law, as an indication either that Congress was reinforcing what it originally intended the statute to mean, or that Congress was acknowledging that the prior law was different from the amendment. Occasionally the statute, and more often a committee report, will

state that no inference as to prior law shall be drawn from the amendment. Although such an expression of Congressional self-restraint may not be too helpful, it is not subject to criticism. On the other hand, a statement in the committee report that a prospective amendment is intended to "reflect existing law" is an indirect attempt to legislate retroactively.

Section, 8/23/58.

COMMON CAUSE,
Washington, D.C., January 26, 1982.

Hon. WILLIAM FRENCH SMITH,
Attorney General, Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL: I write on behalf of Common Cause to protest the Administration's recent actions undermining the Internal Revenue Service policy of denying tax exempt status to private schools which discriminate on the basis of race. The Administration's approach to this issue has been legally wrong, and procedurally indefensible. No legislation is needed to validate the long-standing IRS policy, which has a solid basis in law and has been tacitly approved by Congress. Singling out this IRS policy from all other analogous interpretative rulings, and claiming that it, alone, needs specific Congressional action before it can be enforced is itself discriminatory.

Further, there appears to be no justification for the Administration's decision to grant favored tax exempt status to Bob Jones University and Goldsboro Christian School. Nothing relevant to the tax laws distinguishes these two schools from many others similarly situated—except the judicial ruling that they are not tax exempt. If the other segregated institutions are to be denied a tax exemption, the same policy should apply to Bob Jones University and the Goldsboro Christian School. The Administration's determination to grant them favored status seems to be only a device for circumventing the Judiciary by mooting a successful legal case, vacating an important lower court decision, and avoiding a Supreme Court ruling.

The Treasury Department's view that it need not deny tax exemptions to segregated schools is plainly contrary to judicial precedents. In 1971, a three-judge district court permanently enjoined the Department from granting tax exempt status to private schools in Mississippi which engage in racial discrimination. *Green* v. *Connally,* 330 F. Supp. 1150 (D.D.C. 1971) (three-judge court), aff'd mem. sub nom. *Coit* v. *Green* 404 U.S. 997 (1971). Although the wording of that injunction is technically limited to schools located in Mississipi, the court left no doubt that its reasoning and its declaration of law applies nationwide. Judge Levanthal, writing for the court, stated:

"To obviate any possible confusion, the court is not to be misunderstood as laying down a special rule for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." 330 F. Supp. at 1174.

The three-judge court anticipated the danger of weakening actions by the Treasury Department. In ruling that declarative and injunctive relief were necessary despite the Department's voluntary agreement to change its policy, the court noted:

"If defendants' construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." 330 F. Supp. at 1170–71.

The Treasury Department explains its recent "change of perceptions" by referring to your advice as Attorney General that there is insufficient statutory basis in the tax code for the Treasury to continue to deny the exemptions. This advice flies in the face of precedent.

In *Green* v. *Connally,* supra, the three-judge court concluded, after extensive analysis, that denial of tax exemptions to discriminatory institutions was not only authorized, but required, by the current tax provisions. 330 F. Sup. at 1164. To do otherwise, the court said, would "frustrate" long-standing federal public policy against support for racial segregation of schools. Id. at 1164. Further, the court held that any contrary construction of the tax code—such as that now adopted by the Treasury Department—would "raise serious constitutional questions." Id. The court held that "it would be difficult indeed to establish that such support can be provided consistently with the Constitution." Id. at 1165; *see also Green* v. *Kennedy,* 309 F. Supp. 1127 (D.D.C. 1970). The Supreme Court affirmed this decision. *Coit* v. *Green,* 404 U.S. 997 (1971).

The Fourth Circuit reached precisely the same result in *Bob Jones University* v. *United States,* 639 F. 2d 147 (4th Cir. 1980), cert. granted 50 U.S.L.W. 3278 (U.S. Oct.

13, 1981). The court relied heavily upon the reasoning of the *Green* case to conclude that the IRS acted within its statutory authority in denying tax exempt status to a racially discriminatory school. The court held that the government's interpretation of the tax code to deny such an exemption was supported by the statute's "purpose and history," and was consistent with "government policy against subsidizing racial discrimination in education, public or private." Id. at 151. It is this decision which the government now seeks to have the Supreme Court vacate as moot.

One more point is exceedingly important. Surely you will agree that under our system of government it is ultimately for the Judiciary to rule upon whether the Treasury as authority to rule upon whether the Treasury has authority to withhold tax exempt status from a school that engages in racial discrimination. Two courts have held that it does have that authority. As a former Solicitor General of the United States I realize that there are occasions on which a responsible law officer feels that he cannot in good conscience defend a lower court decision favorable to the Government. I assume that that was your position on the merit in this case, even through it seems to me to fly in the face of reason and justice. But surely, on that assumption, the only proper course was to ask the Solicitor General to file a confession of error, stating that you believe the judgment below to be erroneous, explaining your reasoning, and submitting the issue to the Supreme Court for its decision. If no one else was willing, you could have filed such a confession of error as Attorney general. Seeking to moot the case by give in these two taxpayers preferential treatment, however well intended, is bound to appear as deliberate effort to avoid a judicial ruling.

I submit that the suggestion of mootness should be withdrawn, and that any question concerning the correctness of that judgment should be submitted to the decision of the U.S. Supreme Court.

The Treasury Department's assertion that there is a need for congressional guidance at this time is also without foundation. The non-exemption policy implemented by the Treasury Department in 1971 was followed for eleven years by both Republican and Democratic administrations, and with the full knowledge of Congress. Particularly in light of the judicial decisions which had construed the current code to support and authorize that practice, Congress' failure to amend the statute over the past decade must be considered as expressing agreement with the Treasury Department's policy. See, e.g., *Helvering* v. *Winmill,* 305 U.S. 79, 83 (1938). Congressional action would be necessary only to change the Department's long-standing practice, not, as you suggest, to continue it. Indeed, Congress has approvingly noted the judicial decisions requiring the denial of tax exemptions to segregated schools. Both the House and Senate reports on a 1976 tax bill cite the Supreme Court affirmance of *Green* v. *Connally, supra,* and state that racial discrimination is "inconsistent" with an education institution's tax exempt status. S. Rept. No. 94-1318, 94th Cong., 2d Sess 8 n.5 (1976); H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 n.5 (1976).

The Internal Revenue Service, in its day-to-day administration of the tax code, makes countless determinations on the scope and application of the law, including questions of whether exempt status in justified in light of clear national policies. *See,* e.g., Revenue Ruling 80-278, 1980-2 C.B. 175; Revenue Ruling 80-279, 1980-2 C.B. 176; Revenue Ruling 76-204, 1976-1 C.B. 152; Revenue Ruling 75-384, 1975-2 C.B. 204. In Revenue Ruling 76-204, for example, exemption was granted on the ground that "the organization is enhancing the accomplishment of the *express national policy* of conserving the nation's unique natural resources." (Emphasis supplied.) In Revenue Ruling 75-384, on the other hand, exemption was denied to an organization formed to promote world peace and disarmament by nonviolent direct action including acts of civil disobedience on the ground that the organization's activities "demonstrate *an illegal purpose which is inconsistent with charitable ends.*" (Emphasis supplied.) In addition to these recent "published" rulings, many "private letter rulings" have proceeded on a similar analysis. All of these authorities take various national policies into account in passing upon the issue of exemption.

Such decisions applying fundamental national policies are routinely made without recourse to Congress. The Treasury Department has now singled out one policy relating to the tax treatment of segregated schools and imposed upon it the unique obstacle of requiring express congressional approval. In singling out this one policy as requiring specific congressional approval, the Administration is imposing an unwarranted and perhaps unconstitutional burden on the federal government's antidiscrimination policies. In an analogous situation, the Supreme Court has held that the imposition of special burdens on those seeking governmental relief against racial discrimination is itself a violation of the Equal Protection Clause. *Hunter* v. *Erikson,* 393 U.S. 385, 391 (1969).

Thus, the Administration's actions in these cases, unless corrected, will have two distressing consequences. Despite belated protestations, it will encourage discriminatory racial policies regugnant to most Americans. It will also foster the widespread cynicism that results when the chief law officer of the United States puts himself in a position of seeming to grant special favors to two taxpayers in an effort to circumvent the rule of law.

Sincerely,

ARCHIBALD COX, *Chairman.*

FEB 1982
FEB 25 1982

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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WAYS AND MEANS

February 23, 1982

The Honorable Daniel Rostenkowski
Chairman, House Committee on Ways and Means
2111 Rayburn House Office Building
Washington, D.C. 20515

Re: Green v. Connally, 335 F. Supp. 1150 (D.D.C.) (three-judge court), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

Dear Chairman Rostenkowski:

In justifying their January 8 decision reversing the eleven-year-old policy of denying tax exempt status to racially segregated private schools, Administration officials have contended that they were not bound by the Supreme Court's affirmance of the 1971 District Court decision declaring tax benefits for racially discriminatory schools unlawful and enjoining the Internal Revenue Service from granting such tax benefits to Mississippi Schools. The Administration's argument is that because the Internal Revenue Service reversed its policy in 1970 before the District Court decision, and before the Supreme Court's affirmance of that decision, the Supreme Court's summary affirmance was not a truly adversary proceeding, and therefore lacks any weight as precedent which the Administration is bound to follow.

As attorney representing the Green v. Connally plaintiffs both in the District Court and in the Supreme Court, I can assure you that this argument distorts the legal proceedings at that time. The 1971 Supreme Court affirmance did take place in an adversary context, and therefore constitutes binding precedent which this Administration is bound to follow.

When the District Court handed down its opinion, declaratory judgment applicable nationwide, and injunction setting specific procedures for the Internal Revenue Service to follow in Mississippi (but also intended by the Court to be applied nationwide), Green v. Connally, 339 F. Supp. 1150 (D.D.C. 1971) (three-judge court), the defendants--the Secretary of the Treasury and the Commissioner of Internal Revenue--did not appeal, but the intervenors did. The intervenors in Green were a white Mississippi parent and his two schoolchildren attending a racially discriminatory private school who were permitted to intervene on behalf of a class of parents and children who support or attend private, nonprofit, hitherto tax exempt schools in Mississippi having an enrollment consisting only of members of the white race and established as an alternative for white students seeking to avoid desegregated public schools. 330 F. Supp. at 1155.

In their Jurisdictional Statement in Coit v. Green (No. 71-425), these intervenors embraced the position previously taken by the Government. They contended (1) that the black Mississippi parents and schoolchildren who were plaintiffs lacked standing to challenge Federal tax benefits for private segregated schools; (2) that the District Court decision withdrawing these tax benefits abridged the First Amendment rights of free association of intervenors and their class; (3) that the District Court erred in holding that Federal public policy having Constitutional ingredients governed the interpretation of the Internal Revenue Code; and (4) that the District Court erred in holding that Federal public policy foreclosed Federal tax subsidies to segregated private schools. See Jurisdictional Statement, pp. 11-20. In support of their position, the intervenors quoted extensively from an earlier Government brief supporting its prior policy (of granting tax benefits) (Jurisdictional Statement, pp. 12-13), and from the deposition of Commissioner of Internal Revenue Raldolph Thrower defending the prior practice (id., pp. 18-19).

The Solicitor General on behalf of the Federal official defendants filed a motion to dismiss the appeal (enclosed), arguing that the Supreme Court lacked jurisdiction to entertain the appeal because as parents and children, intervenors were unable to show any specific or direct injury resulting from the District Court's decision, and they were not sufficiently aggrieved to maintain the appeal (Motion to Dismiss, p. 6); that they were not restrained by the injunction (id.). The Government also argued that the District Court was without jurisdiction under Section 7421(a) of the Internal Revenue Code to grant the relief requested by intervenors, viz., to require the defendants to reverse their new policy and restore tax exemptions and deductions for contributions to segregated private schools (id., pp. 8-12); and that the Federal official defendants were immune from suit (id., pp. 12-14).

The Mississippi black plaintiffs, whom I represented, also filed a Motion to Dismiss or Affirm (enclosed). We argued that because the District Court's order did not require the intervenors to do anything or refrain from doing anything they could not show the requisite direct injury to some legally cognizable interest properly claimed by them and their class (Motion to Dismiss or Affirm, pp. 6-8); and that even if the intervenors did have standing to maintain their appeal, the Supreme Court lacked jurisdiction of their appeal because the District Court's order was rendered on statutory and not constitutional grounds (id., pp. 8-11). Alternatively, we contended that the District Court's order should be affirmed because the District Court was correct when it held that Federal financial encouragement, through tax benefit, of segregated private schools was inconsistent with Federal constitutional and statutory policies against encouragement and subsidies to racial segregation in education (id., pp. 11-14); and that the District Court was correct in denying relief to the intervenors on their asserted First Amendment claims (id., pp. 14-15).

Instead of dismissing the appeal, as requested by the Government and the plaintiffs-appellees, the Supreme Court summarily affirmed the District Court's judgment, Coit v. Green, 404 U.S. 997 (1971), thus affirming the District Court on the merits of its decision.

The Supreme Court appeal thus involved a truly adversary proceeding in which all the Government's prior contentions on the merits were raised by the intervenors, and in which the Government's procedural contentions against the plaintiffs were again made by the Government in resisting the intervenor's appeal.

The Government, as a party to the Green appeal in which all the merits and procedural issues were made and briefed, thus is bound by the Supreme Court's affirmance of the District Court's decision. This affirmance is of course binding, not only on the original Federal official defendants, but also on their successors in office. Fed. R. Civ. P., Rule 25(d). To the extent that the Supreme Court may have suggested otherwise in Bob Jones University v. Simon, 416 U.S. 725, 740 n. 11 (1974), this merely is dictum, and was made without full briefing or investigation of the status and issues raised in the Green appeal. The Green v. Connally decision, and the Supreme Court's affirmance, has been cited as precedent not only by the Supreme Court itself, Norwood v. Harrison, 413 U.S. 455 (1973), but also by the lower courts which followed it in numerous other cases. Wright v. Regan, 656 F.2d 820 (D.C. Cir. 1981); Bob Jones University v. United States, 639 F.2d 147 (4th Cir. 1980); Goldsboro Christian Schools v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977), aff'd, No. 80-1473 (4th Cir. Feb. 24, 1980); Prince Edward School Foundation v. C.I.R., 478 F. Supp. 107 (D.D.C. 1979), aff'd, ___ F.2d ___ (D.C. Cir. 1980); Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974); McGlotten v. Connally, 338 F. Supp. 448 (D D.C. 1972) (three-judge court); Bob Jones University v. Connally, 472 F.2d 903 (4th Cir. 1973); Crenshaw County Private School Foundation v. Connally, 474 F.2d 1185 (5th Cir. 1973); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Pitts v. Department of Revenue for State of Wisconsin, 333 F. Supp. 662 (E.D. Wisc. 1971); Bob Jones University v. Roudebush, 529 F.2d 514 (4th Cir. 1979).

I am enclosing copies of these briefs which were filed in the United States Supreme Court in the Coit v. Green appeal, and request that these briefs and this letter be made a part of your hearing record.

Thank you for your consideration of this important matter.

Yours very truly,

Frank R. Parker

Enclosures
FRP:dm

IN THE

Supreme Court of the United States

No. 71-[illegible]

DAN COIT and his minor children
LAUREN F. and LINDA A. COIT,
Intervenors-Appellants,

v.

WILLIAM H. GREEN and his minor children CONNIE and BELINDA GREEN; VERNON T. GRIFFIN and his minor child VERNON T. GRIFFIN, JR.; JOHN D. WESLEY and his minor children SHIRLEY A., FLORENCE and JESSIE L. WESLEY; WARREN G. BOOKER and his minor adopted son ADAM W. GILLEY; and ESSIE B. AUSTIN,
Plaintiffs-Appellees,

and

JOHN B. CONNALLY, As Secretary of the Treasury of the United States and JOHNNIE M. WALTERS, As Commissioner of Internal Revenue,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia
(Civil 1355-69)

JURISDICTIONAL STATEMENT

GEO. STEPHEN LEONARD,
LEONARD, CLAMMER & FLUES,
1725 K Street, N.W.
Washington, D. C. 20006
Attorneys for Appellants.

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IN THE

Supreme Court of the United States

No.

DAN COIT, et al.,
Intervenors-Appellants,
v.
WILLIAM H. GREEN, et al.,
Plaintiffs-Appellees,
and
JOHN B. CONNALLY, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia

JURISDICTIONAL STATEMENT

This is a direct appeal under 28 U.S.C. § 1253 from a permanent injunction issued by a three-judge district court which orders the Internal Revenue Service to revoke previously allowed educational tax exemptions of white private schools within 90 days on the ground that they are inconsistent with a "Federal policy against government support for racial segregation of public or private schools, declared in the post-Civil War amendments to the Constitution, the rulings of the Supreme Court and the Civil Rights Act of 1964." The appellants represent the private schools affected by the order.

OPINIONS BELOW

The opinion was filed June 30, 1971 and is printed in the appendix. It has not been officially reported.

An earlier opinion determining the basis of the court's jurisdiction and issuing a preliminary injunction is reported at 309 F. Supp. 1127.[1] This, together with two supplementary injunctions, is also available to this Court in the Office of the Clerk in the Appendix to the Jurisdictional Statement filed in *Coit* v. *Green*, No. 820, October Term, 1970.

Two prior rulings by this Court deny jurisdiction of interlocutory appeals by these appellants (a) from a denial of intervention and (b) from preliminary injunctions directing suspension of existing private school exemptions. *Cannon* v. *Green*, 398 U.S. 956 (1970) and *Coit* v. *Green*, 400 U.S. 986 (1971).

JURISDICTION

The Jurisdictional Issue

The final order appealed from was entered in a civil proceeding heard and determined by a district court of three judges convened under 28 U.S.C. § 2282, and directed the 90 day cancellation of tax exemption certificates of private white schools and other mandatory relief against the United States. The order further denied appellants injunctive relief under the First Amendment to compel the federal tax authorities to reestablish the *ante litem* operation of the exemption laws. Such order thus grants and denies a permanent injunction restraining the Internal Revenue Service in the enforcement of

---

[1] *sub nom Green* v. *Kennedy*, cited hereinafter as "*Green*, p. —."

tax statutes. Appellants' right of direct appeal is
d on 28 U.S.C. § 1253.

uch right of appeal is to be strictly construed, *Allen*
State Bd. of Elections, 393 U.S. 544, 560-563, 89
Ct. 817, 829-30 (1969), and does not lie if the consti-
ional issue was not decided, (cf. ftn. 25 p. 560).
here, however, the determination is a constitutional one,
risdiction is clear. Cases supporting such right of ap-
l to review decisions denying the abridgment of First
ndment rights are

Flast v. *Cohen*, 392 U.S. 83, 90-91; 88 S. Ct. 1942, 1947 (1968).
Schneider v. *Smith*, 390 U.S. 17, 22; 88 S. Ct. 682, 685 (1968).
Keyishian v. *Bd. of Regents*, 385 U.S. 589, 87 S. Ct. 675 (1967).
Zemel v. *Rusk*, 381 U.S. 1, 5-7; 85 S. Ct. 1271, 1274-76 (1965).

The jurisdictional question now raised is, therefore, whether in the terms of § 1253 this was a case "required by any Act of Congress to be heard and determined by a district court of three judges." § 2282 in turn requires such a court if the requested restraint on the enforcement of a federal statute is based on "repugnance to the Constitution." Appellants argue that such was in fact the basis of the order here appealed from.

The court below disclaimed the making of any constitutional determination. Appellants to the contrary say that not only was the denial of their own injunctive prayer to restrain the withdrawal of private school exemptions a constitutional determination under the First Amendment, but that a constitutional interpretation was also the necessary basis to support the standing of plaintiffs and for entry of the order against the United States. To establish this, appellants show to this Court the following.

4

The Pleadings

The complaint was filed May 21, 1969 by Negro public school parents and children as taxpayers to restrain the United States from continuing the educational tax exemptions provided in 26 U.S.C. §§ 170 and 501 for segregated white private schools. *A 1.* Plaintiffs charged a violation of their Fifth Amendment rights and prayed declaratory and injunctive relief against defendant tax officials.

The United States denied the claim of right, asserted the correctness of its recognition of such exemptions under the terms of the statute, and challenged the standing of plaintiffs both as taxpayers and as an impermissible suit for a declaratory judgment in a tax question (28 U.S.C. § 2201), *Green, p. 1132.*

Plaintiff's claim of constitutional right to restrain further recognition of segregated private school exemptions was held to be substantial by a three-judge court convened under 28 U.S.C. § 2282. *Green, p. 1132.*

> "A determination in this action in favor of plaintiffs, though confined to a temporary or permanent decree limited to prohibiting exemptions and deductions for segregated schools in Mississippi, obviously has broader geographical significance, and thus presents the kind of order which Congress mandated be available only from a three-judge district court, with right of direct appeal to the Supreme Court. Flast v. Cohen, *supra* 392 U.S. at 89-90, 88 S. Ct. 1942, 1946-47 (1968)."

A preliminary injunction was then issued granting plaintiffs' prayer to require the Internal Revenue Service to suspend action on pending applications, *Green, p. 1140.*

Appellants, parents and children of the private schools affected, intervened to oppose, and in their turn prayed declaratory and injunctive relief supporting their conflicting claim under the First Amendment to freely assoate in schools of their choice without thereby subjecting themselves to disallowance of exemptions under the Internal Revenue Code, *A* 25.

The posture of the case was completely changed in July 1970, when the Internal Revenue Service announced a reversal of its prior exemption policy, *A* 7, and consented to further preliminary injunctions requiring suspension of existing exemptions. Alleging that plaintiffs through the injunctions and change of future policy had received all the relief prayed by the complaint, the United States then unsuccessfully moved to dismiss the action as moot, *A* 34.

The Ruling Appealed From

The action was heard on the merits in October 1970 and final judgment was entered for plaintiffs on June 0, 1971. As to the standing of plaintiffs to invoke the Court's authority for declaratory and injunctive relief against the United States, the Court held that they possessed ". . . fundamental statutory rights infused with constitutional ingredients." *A* 36.

> "However our discussion of the issues, including the intervenors constitutional objections makes it plain that there are strong constitutional aspects to plaintiffs' claims and that these are more prominent and substantial than a mere scenic backdrop. If the Internal Revenue Service had not adopted its July 1970 interpretation, and if this court had acquiesced in the pre-1970 interpretation, we would in all likelihood have been required by the Constitution to enter a decree ordering the Service to cease violating plaintiffs' constitutional rights . . . [and] would have little hesitancy in saying that whether or not the statutory provision was unconstitutional on its face, it was unconstitutional as applied . . ." *A* 37-38.
>
> "We have no hesitation in ascertaining that plaintiffs' statutory rights are of such constitutional cali-

> ber even though technically we have not had to enter a full ruling on the merits of their initial Constitutional claim." *A 50.*

On the merits of the complaint, the Court ruled that "a federal policy derived from Congressional enactment as well as the Constitution itself" had come into existence against the extension of federal benefits to "racially discriminatory schools" and accordingly 26 U.S.C. §§ 501 (c) (3) and 170(a)-(c) were henceforth inapplicable

> "to any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students." *A 53.*

Although this was stated to be only an interpretation of the tax laws on the basis of a change in public policy which "obviates the need to determine such serious constitutional claims," *A 25*, the plaintiffs' rights were held to be of such a character (1) that no future reinterpretation of the tax laws could be permitted on any further change in such policy:

> "If [IRS] construction were discretionary, it could be changed in the future. We think plaintiffs are entitled to a declaration of relief on an enduring permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration or changing perceptions of sound discretion." *A 36.*

and (2) that the existing enforcement procedures of Internal Revenue under its tax regulations were inadequate to properly implement the new policy since "plaintiffs are entitled to a decree that goes beyond the 1970 declaration and approach of the Service," *A 35*, to ". . . more effective relief than a mere declaration of statutory construction," *A 52*, and "to more relief than the IRS contemplates," *A 36.*

On such basis the Court ordered the Internal Revenue Service to revoke existing private segregated school exption letters with 90 days, *A 56(C)*, to direct public vertising of non-racial admission requirements, *A 57* 4), to oversee the integration of extracurricular activies and scholarship entitlement in private schools, *A 55* 3), and to disallow pending applications not meeting se standards, *A 51(D)*.

In dismissing the injunctive prayer of appellants, *A 27*, e Court conceded that the First Amendment as inter- eted by this Court's decisions supported appellants' ght to associate in private schools of their choice with- t regard to the educational philosophy involved, *A 27-* . It held, however, that the tax exemptions in question re "benefits" which could be withdrawn without abridg- g that Constitutional right, distinguishing this Court's irst Amendment rulings sustaining tax exemptions in *Speiser* v. *Randall*, 375 U.S. 513, 78 S. Ct. 1332 (1958) and *Walz* v. *Tax Comm*, 397 U.S. 664, 90 S. Ct. 1409 1970).

As to the conflict between the constitutional claims of laintiffs and intervenors, the former were to be preferred since

> ". . . there is a compelling Government interest in the interdiction of racial discrimination which would be dominant over other constitutional interests if they were in complete and unavoidable conflict." *A* [illegible].
>
> "The freedoms of the Bill of Rights must be read not in opposition to the safeguards of the Amendments adopted after the Civil War, but in harmony with them, toward the objective of continued national union." *A 34*.

On the foregoing, appellants say to this Court that spite repeated disclaimers by the three-judge court in s present opinion, the following four matters were in ct determinations of constitutional right.

(a) the "constitutional caliber" of "plaintiffs' statutory rights" giving standing to challenge the operation of the statute;

(b) the denial that any abridgement of the First Amendment right of appellants arises by withdrawing their existing exemptions;

(c) the denial to the United States of further interpretative discretion in the operation of these tax laws under any future change in policy, and

(d) the direction—contrary to agency discretion under a statutory interpretation—to IRS to enforce the new reading in a specified manner inconsistent with or "beyond" its published regulations.

Accordingly, the restraint on the operation of the tax statutes granted to plaintiffs as well as the restraint thereon denied to appellants was necessarily based on "repugnance to the Constitution" as given in § 2282 and a three-judge court was therefore "required" within the meaning of 28 U.S.C. § 1253—as originally determined by the lower court itself, *supra*, p. 4, and as such authorizes direct appeal to this Court.

Notice of appeal was filed by intervenors in the District Court on July 27, 1971. A stay of the 90 day revocation order was denied. It was opposed by plaintiffs, but not objected to by the Government.

STATUTES INVOLVED

Title 28, U.S. Code § 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c.646, 62 Stat. 928.

Title 28, U.S. Code § 2282. Injunction against enforcement of Federal statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court r judge thereof unless the application therefor is heard nd determined by a district court of three judges under ection 2284 of this title. June 25, 1948, c.646, 62 Stat. 68.

Title 26, U.S. Code § 170. Charitable, etc., contributions and gifts.

(Extracts as given by District Court, A [illegible])

(c) Charitable contribution defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

* * * *

> (2) A corporation, trust, or community chest, fund, or foundation—
>
> > (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State or Territory, the District of Columbia, or any possession of the United States;
> >
> > (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;
> >
> > (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
> >
> > (D) no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation.

A contribution or gift by a corporation to a trust, chest, fund, or foundation shall be deductible by reason of this paragraph only if it is to be used within the United States or any of its possessions exclusively for purposes specified in subparagraph (B).

Title 26, U.S. Code § 501. Exemption from tax on corporations, certain trusts, etc.

(c) List of exempt organizations.—. . .

* * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Title 26, Code of Federal Regulations § 1.503(b)(2).

An exempt educational organization is defined as:

* * * *

(2) An educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on;

QUESTIONS PRESENTED BY THE APPEAL

1. Was the lower court in error in holding that plaintiffs had constitutional standing to restrain federal recognition of educational exemptions for private segregated schools?

2. If not, was the lower court in error in holding that withdrawal of federal tax exemptions from private white schools does not abridge the constitutional freedom of parents to send their children to such schools?

3. If not, was the lower court in error in holding that a "federal public policy" having "Constitutional ingredients" governs the applicability of the tax laws?

4. And if not, was the lower court in error in holding that there is such a present federal public policy to discourage the continuance of private white schools?

STATEMENT OF THE CASE

I

The Issue on the Merits

Reduced to its simplest terms, the issue on the merits the "substantial constitutional question" defined by the wer court, *Green, p. 1131*,

> ". . . whether the statutory provision granting tax exemption may constitutionally be extended to segregated private schools even though the operation of such schools is not otherwise unconstitutional because of state involvement."

e would add, "extended to [or withdrawn from]."

Under the complaint, the plaintiffs, Negro public school rents and children allege that numerous white students d teachers have withdrawn from the Mississippi public schools to attend or teach in private schools which do not admit Negro applicants. The claim was made that some formerly all-white public schools have become all-Negro so that plaintiffs' "opportunities to attend public schools with white students have decreased" which denies them the

> ". . . opportunity of a desegregated education and forces them to suffer an inferior education in violation of the Fifth Amendment to the Constitution of the United States."

To correct this, plaintiffs sought to suspend and revoke the tax exemptions of such schools:

> "federal tax benefits to segregated private schools violates the limitations upon the exercise of the congressional taxing and spending power imposed by the equal protection guarantees of the Fifth Amendment . . ."

The United States opposed this position, outlining the established Treasury practice.

> "The present statute which provides tax exemptions to charitable and educational organizations is of long standing and has its roots not only in the earliest predecessors of the Internal Revenue Code, but in the fundamental common law of the land. Pursuant to these statutes, the Internal Revenue Service has, through the years, recognized the tax exempt status of educational institutions without regard to whether they are segregated. In issuing private ruling letters recognizing these exemptions, the Service has followed the statutory directive requiring that the tax exemption be recognized if the organization can show that it does not operate for profit and is in fact an educational institution.
>
> "With the increase of private segregated schools, the Internal Revenue Service had occasion to review the statutory and constitutional issues surrounding the issuance of ruling letters recognizing the tax exempt

status of private segregated schools. On August 2, 1967, the Service issued the following statement:

> '. . . [T]he Service stated that its general conclusion is that exemption will be denied and contributions will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of the laws of the United States.
>
> 'Where, however, the school is private and does not have such degree of involvement with the political subdivision as has been determined by the courts to constitute State action for constitutional purposes, rulings will be issued holding the school exempt and the contributions to it deductible assuming that all other requirements of the statute are met.'
>
> * * * *
>
> "There is no question but that the schools to which such rulings have been issued are non-profit private educational institutions duly organized and accredited under the laws of Mississippi."

Appellants joined in the position of the government and yed injunctive relief to continue this Treasury practice as being the only interpretation consonant with their st Amendment right to maintain their schools. The junction was denied, the lower court granting judgment for plaintiffs in the preliminary and final orders eviously described.

Assuming therefore with the lower court that plainffs have standing to raise the issue, and accepting the ic principle of interpreting statutes in harmony with stitutional requirements, the principal issue on the rits is whether a selective withdrawal of tax exemptions from a single form of educational organization alizes the citizens who support it and thereby abridges their constitutionally recognized freedom to make such schools available to their children.

II

Substantiality

Substantiality of the Legal Issue

The First Amendment freedom of appellants to associate at their own expense in schools of their choice is confirmed by the court below, *A 26-27*, on the holdings of this Court in *Pierce* v. *Hill Military Academy*, 268 U.S. 510, 45 S. Ct. 571 (1925); *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) and *School District of Abington* v. *Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963), without regard to the acceptability of their motives, *Scales* v. *United States*, 367 U.S. 203, 81 S. Ct. 1469 (1961), *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S. Ct. 1238 (1966), or the truth or social utility of the beliefs involved. *NAACP* v. *Button*, 371 U.S. 415, 83 S. Ct. 328 (1963).

The constitutional determination contested on this appeal is the holding that this right of appellants is not abridged by "the withdrawal of benefits available on general terms." *A 28*, even though a restoration of exempt status is offered if appellants would now agree to adopt the Court's preferred form of education.

> "In the case before us exemptions and deductions would be denied not on account of beliefs and associations but on account of acts and practices constituting discrimination among students on account of race—acts contrary to a national policy that has constitutional ingredients. If schools sincerely terminate those harmful activities they may obtain the exemption." *A 28*.

Appellants urged upon the lower court the holding in *Speiser* v. *Randall*, 357 U.S. 513, 78 S. Ct. 1332 (1958). This was rejected.

"*Speiser* certainly does not hold that a government acts impermissibly in withholding tax benefits from one who engages in activities that are reasonably and constitutionally deemed contrary to the government's policy." *A 28*.

It is appellants position that the holding of this Court [illegible] *Speiser* is directly contrary to the reading given it by the lower court, that the essence of *Speiser* was to sustain tax exemptions for an activity protected by the First Amendment even though blatantly opposed "to the government's policy."

Similarly we argue that the lower court in distinguishing constitutionally between racial and religious association under the First Amendment, unduly limits the principle of "benevolent neutrality" announced by this Court in *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970). In the opinion of appellants that case held that tax exemptions uniformly applied are "passive" benefits and do not constitute federal support of the organization receiving them. We also note that the specific prohibition in the First Amendment against the "establishment" of religion, makes the application of *Walz* to other constitutionally protected classes, an *a fortiori* conclusion.

The issue so posed is of major importance. There is no case cited by the lower court or existing to our knowledge which supports the conclusion in the appealed ruling that private schools must be subjected to the desegregation rules applicable to state supported public schools. A review of the precedent cited in the opinion as analogy in the enforcement of such a desegregation policy shows that the cited holdings concern either state support activity or are the usual supremacy decisions over conflicting state legislation. The present decision is not merely novel in applying to private citizens the policies governing the action of state bodies, but it opens a Pandora's box of interpreting the constitution in the light of current "federal policy," a principle that would go far toward eliminating every form of dissent voiced under the Bill of Rights—at least to the extent that the tax laws could be selectively enforced against the dissenter, the very situation condemned in *Speiser.*

Another complete reversal of precedent is the Court's definition of "national policy" used to interpret the tax laws. The customary non-constitutional public policy argument in federal taxation has been referred to in a number of cases decided by this Court. The Court below has noted these. *A 19*, *Lilly* v. *C.I.R.*, 343 U.S. 90, 72 S. Ct. 497 (1952), *C.I.R.* v. *Tellier*, 383 U.S. 687, 86 S. Ct. 1118 (1966) and *Tank Truck Rentals, Inc.* v. *C.I.R.*, 356 U.S. 30, 78 S. Ct. 507 (1958). In each of these rulings deduction has been disallowed as against public policy only after it has been established that the questioned payment was in furtherance of an act defined as illegal by some specific statute. This concept of "illegality" was specifically adopted by Congress in the Tax Reform Act of 1969, Section 902(a) and (b), and is followed by the Internal Revenue Service, *United States* v. *Omaha Live Stock Traders Exchange*, 366 F.2d 749 (8th Cir. 1966). In short, the "national policy" declared by the District Court—but for the "constitutional ingredients" on which it relies—would be in conflict with the established principles governing public policy determinations in tax law and would extend this doctrine not merely into an area where no illegality is involved, but into an area where the act in question is admittedly sanctioned by the Constitution itself. Whether such an extension is required by the constitutional considerations outlined in the ruling is clearly a major question of tax law.

Substantiality in Effect

The opinion recognized that the announced rule would affect all private schools of the Nation:

> "To obviate any possible confusion the court is not to be misunderstood as laying down a special rule

for schools located in Mississippi. The underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." *A 42-43*,

reference is made to IRS notices being sent to 15,000 te schools, *A 40*, "to state whether or not its admis- policies are discriminatory." *A 41*. The issues on appeal are national in scope. Approximately 1,300,- organizations are exempt under 26 U.S.C. § 501(c) . This includes an estimated 22,000 private schools an additional 20,000 educational organizations.[2] The e of Education of the Department of Health, Educa- and Welfare has reported on 17,489 non-public ols having 6,305,000 pupils, or 13% of the total na- al school enrollment, more than 90% of which have pecific religious affiliation.[3] Appellants submitted to District Court a random sampling of 100 educational anizations from the exempt listings published by the asury, whose titles suggest an intended admission dis- mination favoring five racial and twenty-one other stitutionally significant classes.[4] All such schools uld be directly affected by the order appealed from.

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[2] G. D. Webster, "Tax Problems of Non-Profit Organizations," Journal of Taxation, Inc., New York (1968), Fourteen papers ed on the Fourth Annual American University Conference on ederal Tax Problems of Non-Profit Organizations, p. 121.

[3] Statistics of Non-Public Elementary and Secondary Schools, 965-6, Pub. OE-20111. An *amicus* brief, contra appellants' posi- on, was filed below on behalf of 300 Orthodox Jewish day schools.

[4] Twelve all-Negro private schools in Mississippi were also entified (Exh. 1) on the deposition of Rev. Jas. D. Gilbert taken nuary 30, 1970. Additional Negro private schools in Pennsyl- nia were described at pp. 49-51 of Appellants Brief in *Lemon* v. *rtzman*, —— U.S. ——, 91 S. Ct. 2105 (1971), recently decided this Court. We find no responsible source for totals of national ivate schools classified by admission standards.

Immediacy:

There is immediate, substantial and irreparable injury suffered by appellants. Until a year ago the established interpretation by the United States of 26 U.S.C. § 501 (c) (3) was that, absent significant state involvement, a non-profit segregated private school would be treated as exempt if it met the definition of an educational organization regardless of its admission policy (*supra*, p. 12). Appellants schools conformed to that definition.

Now, for almost two years past because of this case—during a time when the prayers of the complaint were being granted by interlocutory order to the point where the government moved to moot the case—the appellants' schools have been deprived of the value of their statutory exemption, have lost irrecoverably their normal support from gifts, a result which the lower court foresaw even from its first injunction. *Green, p. 1139.*

Second, as a matter of efficient administration of the courts, a present review of the issue is imperative, the only procedural alternative being an ultimate accumulation of tax suits and appeals in future tax years on a gift by gift basis which would involve a multiplicity of actions applicable to five or ten thousand individual schools.

Third, a present decision would be of direct value to the United States itself. The Commissioner of Internal Revenue, on deposition agreed that an early Court determination of the validity of the new IRS policy would be of assistance in the administration of the tax laws:

> "Q. I take it then that the Internal Revenue Service has no objection to having the question put before the Court?

* * * *

Commissioner Thrower: I think I can go beyond that and say we think it is correct. We think that with Court consideration and action, that there will be that much more acceptance of it, because we recognize that there are some who question the correctness of this from a legal standpoint.

Certainly if we are wrong, legally, we would want to know that.

* * * *

Q. And an early determination would be of advantage in this?

A. From my standpoint as an administrator, wishing to secure the highest level of acceptability and conformity, I would recognize the desirability of that." (pp. 164-65).

CONCLUSION AND REQUEST FOR RELIEF

The issues are procedurally ripe for consideration on this appeal. The circumstances are exigent, the problem is one of national scope and conflicting constitutional right. An early authoritative decision is desirable in the administration of the tax laws. The legal and factual questions are novel and substantial and a present determination would establish a judicial standard for the lower federal courts and avoid a multiplicity of piecemeal actions.

Appellants accordingly move this Court to note jurisdiction of this appeal and upon such appeal to vacate the order appealed from and issue its mandate to the District Court,

1. To restore the *status quo ante litem.*
2. To dismiss the complaint as a matter of law and grant the declaratory and injunctive relief prayed in appellants answer.

Respectfully submitted,

/s/ Geo. S. Leonard
GEO. STEPHEN LEONARD,
LEONARD, CLAMMER & FLUES,
1725 K Street, N.W.
Washington, D. C. 20006

Attorneys for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-425

DAN COIT, *et al.*,
Intervenors-Appellants
v.
WILLIAM H. GREEN, *et al.*
Appellees
and
JOHN B. CONNALLY, JR.,
SECRETARY OF THE TREASURY, *et al.*
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

JAMES ROBERTSON
Lawyers' Committee for
Civil Rights Under Law
Woodward Building,
Suite 520
733 Fifteenth Street, N.W.
Washington, D.C. 20005

FRANK R. PARKER
Lawyers' Committee for
Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201

Washington, D.C. THIEL PRESS 202 393-0625

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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MOTION TO DISMISS OR AFFIRM

Plaintiffs-appellees move the Court pursuant to Rule 16 of the Rules of this Court to dismiss this appeal for lack of jurisdiction or, in the alternative, to affirm the final order of the District Court on the grounds that there has been no showing of an abuse of discretion and that the issues raised by appellants are without substantial merit.

STATEMENT OF THE CASE

The appellants, who are intervenors in this action, seek a direct appeal from the Order for Declaratory Relief and Permanent Injunction entered by the District Court on June 30, 1971, construing certain provisions of the Internal Revenue Code, §§ 501(c)(3) (tax exempt status for educational institutions) and 170 (a) - (c) (allowing deductions for charitable and educational contributions) to deny tax benefits to all-white, racially segregated private schools and establishing compliance procedures for the Internal Revenue Service to follow regarding private schools in Mississippi. As we shall more fully discuss *infra*, this Court lacks jurisdiction of this appeal because appellants seek review of an order which does not affect or injure any identifiable legal interest which they have claimed and because the decision of the District Court does not represent the kind of constitutional adjudication which requires direct review in this Court. Alternatively, the issues raised by appellants lack sufficient substantiality and merit to require this Court to reverse the discretionary order of the District Court.

Plaintiffs filed this action on May 21, 1969, as representatives of the class of Federal taxpayers and black parents and schoolchildren attending public schools in Mississippi for injunctive relief against the then-existing policy of the defendants, the Secretary of the Treasury and the Commissioner of Internal Revenue, of granting tax exempt status and recognizing the deductibility of contributions to racially segregated, all-white private schools. On January 12, 1970, the District Court issued a preliminary injunction upon finding that "threatened federal support for the maintenance of separate school systems for white and black" constituted irreparable injury to the plaintiffs and to the public interest, and that preliminary injunctive relief was necessary because "in view of the court-ordered integration in the public schools of Mississippi, see *Alexander v. Holmes County Board of Education* [396 U. S. 19], exempt status will be given to segregated schools and this exemption and assurance of deductibility will lead to larger and more numerous contributions than would otherwise have been made, and to construction of private segregated schools * * * " *Green v. Kennedy*, 309 F.Supp. 1127, 1139 (D.D.C. 1970). The defendants were preliminarily enjoined from issuing any further exemption rulings or assurances of deductibility to private schools in Mississippi which were "part of a system of private schools operated on a racially segregated basis as an alternative to white students seeking to avoid desegregated private schools." Id. at 1140. On June 26, 1970, after the submission to the court of additional statistics indicating that great numbers of white students were leaving public schools to enroll in segregated, white-only private schools in Mississippi in the wake of court-ordered integration of the public schools, the District Court modified its preliminary injunction, and directed the defendants to "forthwith order * * * the suspension of the advance assurance[s] of deductibility of contributions" to certain segregated private schools in Mississippi during the pendency of the litigation. On July 10, 1970, the Internal Revenue Service announced a change in policy, and declared that "it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes." I.R.S. Press Release, 7 CCH 1970 Stand. Fed. Tax Rep. ¶ 6790.

Intervenors are a white parent and his children who reside in Mississippi and who support or attend a private school there. On January 21, 1970, the District Court allowed their intervention as representatives "of the class of parents and children who support or attend private, non-profit, tax-exempt schools in Mississippi having an enrollment consisting only of members of the white race and established as an alternative for white students seeking to avoid desegregated public schools * * * " (App. A6).[1] The intervenors previously appealed to this Court from the limited grant of intervention by the District Court and from the January 12, 1970, preliminary injunction, but the appeal was dismissed on June 15, 1970, for lack of jurisdiction. *Cannon v. Green*, 398 U.S. 956 (1970). On July 6, 1970, they moved to set aside the June 26 District Court order for supplemental relief, and, after their motion was denied by the District Court on September 14, 1970, they filed a notice of appeal to this Court from the District Court orders of January 12, June 26, and September 14. That appeal, too, was dismissed for want of jurisdiction. *Coit v. Green*, 400 U.S. 986 (1971).

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[1] The abbreviation "App." refers to the Appendix of the Intervenors-Appellants' Jurisdictional Statement, filed September 24, 1971.

On June 30, 1971, the District Court entered an order for declaratory relief and permanent injunction, declaring that:

> "Section 501(c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170 (a) - (c) of the Code, does not provide a deduction for a contribution to, any organization that is operated for educational purposes unless the school or other educational institution involved has a racially nondiscriminatory policy as to students." App. A53.

The permanent injunction requires that as a condition to granting or continuing tax exempt status and assurance of deductibility of contributions to private schools in Mississippi, the defendants must gain assurances from affected schools and extensive information indicating that eligible schools have a racially nondiscriminatory policy as to students. If the required assurances, information and proof of publication of a racially nondiscriminatory policy as to students are not supplied to IRS within 90 days from the date of issuance of the Order, then the tax exemption rulings issued to non-complying Mississippi private schools are to be revoked and deductions for contributions to such ineligible private schools made since June 26, 1970, the date of the supplemental preliminary order of the court, are to be disallowed. App. A56. As the Government pointed out in its memorandum in opposition to appellants' motion for a stay of this injunction, the District Court's order of June 30, 1971, substantially confirms the new policy of IRS in effect since July 10, 1970: "It adds only the requirement that the schools' nondiscrimination statements meet certain further publication requirements and that certain further organizational and operations information be supplied to the Service, and it accelerates somewhat the time period for withdrawal of the rulings that otherwise would obtain under normal Internal Revenue Service procedures." Memorandum for the Federal Appellees in Opposition, p. 2.

The District Court in its decision recognized that this outcome was suggested by recent developments in the law of charities establishing "grave doubt" whether educational institutions which practice racial discrimination can any longer qualify as charitable, as well as by constitutional inhibitions against governmental financial support, direct or indirect, of segregation in education. The final decision, however, was rested on neither of these grounds, but rather on the principle that Congress could not have intended that the federal tax benefits provided by the Internal Revenue Code should benefit institutions whose activities are either illegal or contrary to public policy. Looking to the manifestations of federal public policy contained in the post-Civil War constitutional amendments, the school desegregation decisions of this Court, and Title VI of the Civil Rights Act of 1964, the court found a compelling federal policy against federal support for private schools that practice racial discrimination.

> "The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors." App. A23.

This interpretation of the exemption and deduction provisions of the Internal Revenue Code was held to obviate the need to determine the serious constitutional claims presented in the complaint. App. A25.

Intervenors filed their notice of appeal from the June 30, 1971, order of the District Court on July 27, 1971. Their motions for a stay of paragraph II(C) of the June 30 injunction (requiring revocation of exemption rulings of schools with discriminatory admissions policies) were denied both by the District Court and by the Chief Justice.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO ENTERTAIN THE APPEAL

A. The Appellants Lack Standing to Appeal the District Court's Order of June 30, 1971

Under the District Court's order of January 21, 1970, the appeal from which was dismissed by this Court *sub nom. Cannon v. Green,* 398 U. S. 956 (1970), intervenors represent in this action only the class of parents and children who support or attend all-white private, non-profit, tax exempt segregated private schools in Mississippi established as an alternative for white students seeking to avoid desegregated public schools. App. A6. To establish standing to maintain their appeal, intervenors must show that the order of the District Court from which they now seek to appeal causes direct injury to some legally cognizable interest properly claimed by them and the members of their class. See *Boston Tow Boat Co. v. United States,* 321 U. S. 632 (1944); *Hamilton Trust Co. v. Cornucopia Mines Co.,* 223 Fed. 494 (9th Cir. 1915), *cert. denied,* 239 U. S. 641 (1915). This they have not done and cannot do.

First, the June 30, 1971, order from which the intervenors now purport to appeal does not run against them nor does it order them to do anything or to refrain from doing anything. The defendant federal officials against whom the order does run have not appealed the order, have not appealed a stay of the order, and have in fact opposed a stay of the order. Long-established principles hold that a party not restrained by an injunction order may not maintain an appeal from the order. *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 942 (8th Cir. 1902); *Milgram v. Lowe's Inc.*, 192 F.2d 579, 586 (3d Cir. 1951). Intervenors not directly affected by final decrees have no separate standing to appeal from them. *Chicago v. Chicago Rapid Transit Co.*, 284 U. S. 577 (1931).

Second, the appellants have failed to demonstrate in any specific or compelling way just how they are aggrieved by the order or how they will be directly injured by its implementation. The major impact of the implementation of the order will be on the segregated private schools who fail to demonstrate, under the procedures established by the District Court, a racially non-discriminatory policy as to students, and they are merely deprived of an adminsitrative determination as to their status as tax exempt institutions eligible for deductible contributions. Schools' and contributors' rights are not entirely cut off by such proceedings, since questions of tax exemption or deductibility of contributions may still freely be raised in the Tax Court or in a suit for refund in the district court or the Court of Claims. 28 U. S. C. §§ 1346 and 1491. As the District Court determined in ruling on the motion for preliminary injunction, neither the schools nor potential contributors have a right to be kept ignorant of the fact that serious questions regarding the validity of the tax exempt status and deductibility of contributions to be segregated private schools have been raised. 309 F. Supp. at 3319. The mere fact that the order of the District Court might establish a precedent adverse to the intervenors is not sufficient to support an appeal by them. *Boston Two Boat Co. v. United States*, *supra*; *Bodkin v. United States*, 266 F.2d 55 (2d Cir. 1959).

Third, the individual intervenors have not shown that any school intends to refuse to furnish the additional information requested by IRS or to refuse to give the required assurances of a nondiscriminatory policy as to students and thereby suffer the sanctions of paragraphs II(C) and II(D) of the order. Further, the proof in this action fails to show that the individual appellants have made or wish to make contributions which are rendered nondeductible by the District

Court's order. See affidavit of Dan Coit, filed December 16, 1969, *Coit v. Green*, No. 820 Oct. Term 1970, Supplemental Appendix, pp. 11a-12a. Apparently the segregated private school supported and attended by the named intervenors, the Lamar School Foundation, has been deprived of its advance assurance of deductibility of contributions, not by the June 30 order of the District Court, but for failure of comply with the nondiscrimination policy of IRS voluntarily announced on July 10, 1970. Implementation of the District Court's order of June 30 can have no effect on the status of the institution. Memorandum for the Federal Appellees in Opposition, p. 3. "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." *United Public Workers v. Mitchell*, 330 U. S. 75, 89 (1947). The Court does not indulge in hypothetical determinations; there must always be "a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality" to require a determination. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941). See *Golden v. Zwickler*, 394 U. S. 103 (1969).

B. Appellants Have No Direct Appeal to this Court From the District Court's Order.

Even if the Court should determine that the appellants have standing to maintain this appeal, the governing statutes—28 U. S. C. §§ 1253 and 2282—do not provide for a direct appeal to this Court from the District Court's order of June 30, 1971, construing Sections 170 and 503 of the Internal Revenue Code. Under 28 U. S. C. § 1253 a direct appeal lies to this Court "from an order granting or denying * * * [a] permanent injunction in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.) The Act upon which appellants rely is 28 U. S. C. § 2282, which requires a determination by a three-judge district court only when a "permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States" is granted.

This Court has recently held that § 1253 "is no mere technicality." *Gunn v. University Committee*, 399 U. S. 383, 387 (1970). As stated in *Goldstein v. Cox*, 396 U. S. 471, 478 (1970):

> "This Court has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since 'any loose construction of the requirements of [the Act] would defeat the purposes of Congress * * * to keep within narrow confines our appellate docket.' Phillips v. United States, [312 U. S. 246, 250 (1941)]."

Because the complaint contained constitutional as well as statutory claims, a three-judge court was required to be convened which had pendent jurisdiction to decide plaintiffs' statutory claims. App. A35-A36. However, the District Court, by interpreting the Internal Revenue Code to preclude granting federal tax benefits to segregated private schools, expressly avoided the constitutional issue. App. A24-25. The final injunction, then, did not restrain the enforcement of any Act of Congress for repugnance to the Constitution, and thus was not "an . . . injunction in any civil action . . . required by any Act of Congress to be heard and determined by a district court of three judges." Since relief was granted on the nonconstitutional ground—the District Court determining that the defendants had allowed exemptions and deductions not authorized by the Internal Revenue Code—a direct appeal should not be required under § 1253.

Congress, in devising the three-judge district court scheme and in enacting § 2282, was concerned with providing appropriate safeguards against the invalidation of Congressional legislation and the resulting interference with the administration of federal regulatory schemes on constitutional grounds. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 153-55 (1963). Only under those circumstances, involving "unforseen and debilitating interruptions in the administration of federal law" (372 U. S. at 155), is a speedy direct appeal to this Court justified. Such circumstances are not present here, where the District Court's declaration of rights, on the Government's own admission, merely confirms a voluntary about face, and the injunction merely establishes administrative procedures consistent with policy already declared by IRS to secure effective compliance.

Appellants, in asserting that they have a right of direct appeal to this Court, rely on decisions requiring the convening of a three-judge District Court to hear requests for injunctive relief based upon both constitutional and nonconstitutional claims, although they concede that direct appeal "does not lie if the constitutional issue was not decided." Juris. Statement, p. 3. There may be good reasons to require the convening of a three-judge district court when a complaint presents both constitutional and nonconstitutional claims—to prevent a single judge from restraining Federal administrative action for constitutional violations, *Flast v. Cohen*, 392 U. S. 83, 88-91 (1968)—but this rationale does not apply to appeals under § 1253 when all three judges agree that final injunctive relief should be granted upon the nonconstitutional claim. The statutory language of § 1253 supports the proposition that direct appeal should lie only in those cases which eventuate in a constitutional decision.[2] Direct appeals not only burden the docket of this Court, but also deprive the Court of the "wise and often crucial adjudications of the courts of appeals." *Allen v. State Board of Elections*, 393 U. S. 544, 562 (1969). Once a three-judge court has rendered judgment, there is no reason to focus on the nature of the claims presented in the complaint as determinative of appeals procedure. Where the decision rests on nonconstitutional grounds, the desirability of conserving the resources of this Court and of providing the parties with a full appellate review suggest that appeal ought to lie to the court of appeals. *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386 (1934); *Dymytryshyn v. Esperdy*, 285 F. Supp. 507 (S.D.N.Y. 1968) (three-judge court), *aff'd per curiam*, 393 U. S. 77 (1968). See *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U. S. 73, 86-98 (Frankfurter and Douglas, JJ., dissenting) (1960); Note, "The Three-Judge District Court: Scope and Procedure Under Section 2281," 77 Harv. L. Rev. 299, 311 (1963).

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[2] Compare, the language of 28 U.S.C. § 1252, which should be read *in pari materia* with § 1253, which allows direct appeals to this Court only from decisions of district courts holding an Act of Congress unconstitutional in proceedings to which the United States, its agencies, or officers are parties.

II

ALTERNATIVELY, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED BECAUSE THERE WAS NO ABUSE OF DISCRETION AND THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION.

A. The June 30 Order for Declaratory and Injunctive Relief

The declaration of rights and injunction entered was necessary to prevent irreparable injury to plaintiffs and the plaintiff class from unlawful Federal encouragement of segregated private schools and should be affirmed. In granting the preliminary injunction on January 12, 1970, the District Court made findings that private white segregated schools in Mississippi established as alternatives to integrated public schools were operating on "the thinnest financial basis" (309 F. Supp. at 1135), that tax deductible contributions significantly assisted the schools' capital and scholarship funds (*ibid.*), and that the deductibility assurances constituted a "psychological help," an "approval by the Federal Government" of the white segregated schools (*ibid.*). The Court further found that the interest of the black plaintiffs and of the public in an integrated public school system would be irreparably harmed if deductible contributions were allowed during this litigation, even if the deductions were later terminated, since the funds would have been available to meet the high capital start-up costs of the segregation academies (*id.*

at 1137). These findings were confirmed by the statistical information submitted to the Court in May and June 1970, showing the flight of white students from the schools recently integrated by order of this Court, and formed the basis for the permanent injunction issued on June 30, 1971.

Other courts in the tuition grant decisions affirmed by this Court have noted the considerable damage caused by segregated private schools in the South in draining white students, white teachers, and resources from the public schools, thus causing resegregation of the public schools and forcing black schoolchildren to continue to suffer an inferior education. *E.g., Poindexter v. Louisiana Financial Assistance Comm'n,* 296 F. Supp. 686 (E.D.La. 1968), *aff'd per curiam,* 393 U. S. 17 (1968).

In its final decision on the merits, the District Court reaffirmed its earlier findings and finally determined, as a matter of law, that federal financial encouragement, through tax benefits,[3] of any segregated private school was inconsistent with federal constitutional and statutory policy and additionally served to undermine the effect of the school desegregation decisions of this Court, including *Brown v. Board of Education,* 347 U. S. 483 (1954); and *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971). The inconsistency of Federal efforts, on the one hand, to secure the maximum amount of desegregation of public education, with the initial position of defendants, on the other hand, of undermining those efforts through an interpretation of the tax laws which helped to finance, through exemptions and deductible contributions, the flight of white schoolchildren to private schools established as an alternative to desegregated public schools, has been widely noted and criticized.[4] The relief granted by the District Court was considered necessary to secure plaintiffs' rights "on an enduring, permanent basis, not on a basis that could be withdrawn with a shift in the tides of administration, or changing perceptions of sound discretion." App. A36.

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[3] For an analysis of federal tax benefits as the equivalent of Congressional appropriations, see S. Surrey, "Tax Incentives As a Device For Implementing Government Policy: A Comparison With Direct Government Expenditures," 83 Harv. L. Rev. 705 (Fed. 1970); "Federal Income Tax Reforms: The Varied Approaches Necessary to Replace Tax Expenditures With Direct Governmental Assistance," 84 Harv. L. Rev. 352 (Dec. 1970). Mr. Surrey was Assistant Secretary of the Treasury for Tax Policy from 1961 to 1969.

The intervenors-appellants do not contend that the findings of fact made by the district court in granting final relief are "clearly erroneous." F.R.Civ.P., Rule 52(a). Nor can they seriously contend that federal policy does not prohibit "substantial and significant" governmental financial assistance, direct or indirect, to maintain segregation in education, whether public or private, *Griffin v. County School Bd. of Prince Edward County*, 377 U. S. 218 (1964); *Cooper v. Aaron*, 358 U. S. 1, 9 (1958); *Brown v. South Carolina State Bd. of Educ.*, 296 F. Supp. 199 (D.S.C. 1968); *aff'd per curiam*, 393 U. S. 222 (1968); *Poindexter v. Louisiana Financial Assistance Comm'n*, supra; *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D.Ala. 1967). Further, appellants cannot seriously question the widely recognized maxim of Code construction that Congress could not have intended that the financial inducements and benefits provided by the tax code be interpreted and implemented to "frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." *Tank Truck Rentals, Inc. v. Comm'r,* 356 U. S. 30, 33-34 (1958); and cases cited App. A19-A21.

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[4] Note, "The Validity of Tax Benefits to Private Segregated Schools," 68 Mich. L. Rev. 1410 (June, 1970); Spratt, "Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation," 12 William & Mary L. Rev. 1 (1970); Allen, "The Tax-Exempt Status of Segregated Schools," 24 Tax L. Rev. 409 (1969); Note, "Federal Tax Benefits to Segregated Private Schools," 68 Colum. L. Rev. 922 (1968); Weil, "Tax Exemptions for Racial Discrimination in Education," 23 Tax L. Rev. 399 (1968); United States Comm'n on Civil Rights, Staff Paper, "Legal Implications of Federal Tax Benefits to Racially Segregated Private Schools," Southern School Desegregation, 1966-67, 142-162 (July, 1967); Dorsen, "Racial Discrimination in 'Private' Schools," 9 William & Mary L. Rev. 39 (1967); Nelkin, "Cy Pres and the Fourteenth Amendment: A Discriminating Look at Very Private Schools and Not So Charitable Trusts," 56 Geo. L. J. 272 (1967); Power, "The Racially Restricted Charitable Trust: A Suggested Treatment," 9 St. Louis U.L.J. 478 (1965); Lusk, "The Uncertain Future of Charitable Trusts," 15 Ala. L. Rev. 390 (1963).

Having declared the rights of the plaintiffs and the duties of the defendants under the statute in substantial accord with the publicly announced policies of the defendants, the court then exercised its equitable powers "to provide complete relief in light of statutory purposes," *Mitchell v. DeMario Jewelry, Inc.*, 361 U. S. 288, 292 (1960), to fashion relief appropriate under the circumstances to effectuate its conclusions of law and the rights of the plaintiffs. The final decree does not unduly limit the discretion of the administrative agencies charged with its implementation, except where necessary to secure adequate information on which IRS can base its compliance decisions. Under these circumstances, deference should be given to the trial court in its decree fashioning appropriate relief, and the order should not be set aside unless an abuse of discretion has been clearly shown. *Swann v. Charlotte-Mecklenburg Board of Education, supra; United States v. Montgomery County Board of Education,* 395 U. S. 225 (1969).

B. Denial of Relief to the Intervenors

In granting relief to the plaintiffs, the District Court simultaneously denied intervenors' request for declaratory and injunctive relief to prevent the defendant Treasury and IRS officials from withdrawing tax exemptions and assurances of deductibility of contributions from private schools attended by members of the intervenor class because of their racially discriminatory admissions policies. Answer of Intervening Defendants, Counter-claim and Cross-claim, J.S. and Appendix, *Coit v. Green,* Oct. Term 1970, No. 820, pp. A19-A22. While the District Court recognized that intervenors may have a right to send their children to private schools of their choice, it rejected intervenors' claim that "the schools of their private choice are entitled to government support through tax exemptions and deductibility of contributions" (App. A27) when the operations of those schools contravene compelling governmental policies which must be recognized in construing the relevant provisions of the Internal Revenue Code. The intervening parent's claim that he has a right, secured by the Constitution, to compel the government indirectly to assist in financing his children's non-public education in order that they may obtain an education in an all-white environment, free of racial integration, does not present a substantial question for review by this Court. The rejection of this claim is fairly implicit in this Court's decision in *Griffin v. County Board of Prince Edward County*, 377 U.S. 218 (1964), and was made explicit in the subsequent decision on remand, *Griffin v. County Board of Prince Edward County*, 339 F.2d 486 (4th Cir. 1964) (en banc), wherein the court declared, "The clear and unavoidable implication of the *Brown* decision is that white persons have no constitutional right to associate in publicly maintained facilities on a segregated basis." 339 F.2d at 493. Cf. *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *Sherbert v. Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring); *Brusca v. Missouri*, F. Supp. , 40 U.S.L.W. 2191 (E.D.Mo. 9/28/71) (three-judge court).

CONCLUSION

The appeal from the Order for Declaratory Relief and Permanent Injunction of June 30, 1971, of the District Court should be dismissed for want of jurisdiction. Alternatively, if the Court determines that it has jurisdiction of this appeal, then the Order of the District Court should be affirmed.

Respectfully submitted,

JAMES ROBERTSON
Lawyers' Committee for
Civil Rights Under Law
Woodward Building, Suite 520
733 Fifteenth Street, N. W.
Washington, D. C. 20005

FRANK R. PARKER
Lawyers' Committee for
Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201

No. 71-425

In the Supreme Court of the United States

October Term, 1971

Dan Coit, et al., intervenors-appellants

v.

William H. Green, et al., and John B. Connally, Jr., Secretary of the Treasury, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

ERWIN N. GRISWOLD,
Solicitor General,
FRED B. UGAST,
Acting Assistant Attorney General,
ERNEST J. BROWN,
LEONARD J. HENZKE, Jr.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-425

DAN COIT, ET AL., INTERVENORS-APPELLANTS
v.
WILLIAM H. GREEN, ET AL., AND JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS

The Solicitor General, on behalf of the Secretary of the Treasury and the Commissioner of Internal Revenue, moves, pursuant to Supreme Court Rule 16(1)(d), for dismissal of this appeal from the judgment of the United States District Court for the District of Columbia.

STATEMENT

Intervenors-appellants appeal from the final judgment of a three-judge district court, granting declaratory and injunctive relief in an action brought by William H. Green and others (plaintiffs-appellees) challenging as unconstitutional and unlawful the administration by Treasury Department officials (defendants-appellees) of certain provisions of the Internal Revenue Code of 1954, as applied to private, segregated white schools in Mississippi and to contributors thereto.

Plaintiffs-appellees are Negro school children and their parents or legal guardians, all of whom are residents of, or attend public schools in, Holmes County, Mississippi (J.S. App. A2, No. 820).[1] They alleged in their complaint that Treasury Department officials had granted tax exemptions to private white schools, including specified Mississippi schools, from which Negroes are excluded on the basis of race and color, and had allowed tax deductions to contributors thereto (J.S. App. A5–A8, No. 820), in violation of Sections 501(c)(3) and 170 of the Internal Revenue Code and contrary to plaintiffs' rights under the Fifth Amendment and the Civil Rights Act of 1964 (J.S. App. A8–A10, No. 820).

Intervenors-appellants are a white parent and his children; they reside in Mississippi and support or attend a private school there (J.S. Supp. App. 11a–12a, No. 820). The district court permitted them to intervene as representatives of "the class of parents and children who support or attend private, nonprofit, hitherto tax exempt schools in Mississippi having an enrollment consisting only of members of the white race and established as an alternative for white students seeking to avoid desegregated public schools" (J.S. App. A6, No. 71–425). The intervenors sought declaratory and injunctive relief against possible revocation of tax exempt status for such schools on the ground that revocation would infringe on their constitutional right "to associate together for the common education of their children at their own cost as being a method of expression and association falling within the guaranties of the First Amendment * * * free of obstruction" of plaintiffs' lawsuits or the "defendants' discriminatory reinterpretation of the revenue laws" (J.S. App. A45–A46, No. 1358).[2]

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[1] This case has been before the Court on two prior occasions when the intervenors sought unsuccessfully to prosecute a direct appeal. "J.S. App. No. 1358" references are to the appendix to the first Jurisdictional Statement filed by the intervenors in this case in *Cannon* v. *Green*, No. 1358, October Term 1969, appeal dismissed, 398 U.S. 956. "J.S. App. No. 820" and "J.S. Supp. App. No. 820" references are to the appendix and supplemental appendix to intervenors' second Jurisdictional Statement filed in this case in *Coit* v. *Green*, No. 820, October Term 1970, appeal dismissed, 400 U.S. 986. "J.S. App. No. 71-425" references are to the appendix to the present Jurisdictional Statement filed by intervenors.

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[2] On June 15, 1970, this Court dismissed, for want of jurisdiction, an appeal taken by the intervenors and others (1) challenging the district court's limitation of their class representation, as defined above, and (2) seeking to overturn the district court's grant, without first hearing the intervenors, of a preliminary injunction prohibiting federal approvals of pending or future applications for tax exempt status, filed by private schools in Mississippi operated on a racially segregated basis, and forbidding determinations that contributions to such schools are deductible by the donors. *Cannon* v. *Green*, 398 U.S. 956. On January 11, 1971, this Court dismissed, for want of jurisdiction, another appeal taken by the intervenors to challenge the district court's expansion of the proscription under the preliminary injunction to include all racially segregated schools in Mississippi. *Coit* v. *Green*, 400 U.S. 986.

On July 10, 1970, while the litigation was pending in the district court, the Treasury Department announced that it could no longer, under the law, recognize the tax exempt status of or assure tax deductibility for contributions to, schools having racially discriminatory admissions policies (J.S. App. A7, No. 71-425). Pursuant to this new construction of the Internal Revenue Code, Internal Revenue Service advises that it has, as of October 1, 1971, revoked tax exemption rulings relating to 23 Mississippi private segregated schools, and suspended the deductibility assurances of another seven such schools.[3]

On June 30, 1971, the district court issued a final judgment order which, in substance, confirmed the Treasury's changed policy and implementation procedures, added several additional procedures and advanced a suggested timetable for revoking rulings of noncompliant schools (J.S. App. A53-A56, No. 71-425). On September 14, 1971, it denied intervenors' motion to stay paragraph II(C) of the judgment, requiring the Internal Revenue Service to revoke the tax exemption ruling of any school not furnishing the required information as to its nondiscriminatory admissions and operations policies within 90 days. On October 13, 1971, Mr. Chief Justice Burger denied a similar stay application.

In the present appeal, intervenors seek reversal of the final judgment, a return to the *status quo ante*

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[3] The Internal Revenue Service policy with respect to private schools with racially discriminatory policies is now set forth in Rev. 71-447, Int. Rev. Bull. 1971-40, p. 10.

litem, and declaratory and injunctive relief confirming both tax exempt status and the eligibility for a tax deduction based on a contribution to a racially segregated private school.

ARGUMENT

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THIS APPEAL

1. Intervenors state (J.S. 4) that they are parents and children who support or attend private, white segregated schools in Mississippi which have tax exemption and deductibility assurance rulings that are affected by the judgment of the court below.[1] Their further assertion (J.S. 1), however, that they "represent the private *schools* affected by the order" (emphasis added) is incorrect. The district court limited intervenors' representation in this suit to "the class of parents and children who support or attend private, nonprofit * * * schools in Mississippi" (J.S. App. A6, No. 71-425). Intervenors' direct appeal from this ruling on the scope of their representation was dismissed for want of jurisdiction by this Court in *Cannon* v. *Green*, 398 U.S. 956. No question concerning the class limitation is presented on this appeal. In any event, the limitation on intervention was proper; intervenor parents and children may not represent a class, *i.e.*, the Mississippi private, segre-

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[1] See also intervenors' answer in intervention (J.S. App. A16-A17, No. 820).

gated schools, of which they are not a part.[5] See *Bailey* v. *Patterson*, 369 U.S. 31, 32–33.

It follows that the intervenors have no right to prosecute this appeal from the final judgment of the district court. As parents and children within the defined class, they are unable to show any specific or direct injury resulting from the decision, and thus they are not sufficiently aggrieved to maintain this appeal. See, *e.g.*, *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632; *Lampasas* v. *Bell*, 180 U.S. 276, 283–284; *Tilcston* v. *Ullman*, 318 U.S. 44; *Hampton* v. *St. L., Iron Mt. & S. Ry.*, 227 U.S. 456, 469; *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 197–198; *Cronin* v. *Adams*, 192 U.S. 108, 114–115; 9 Moore's *Federal Practice* (2d ed.), par. 203.06.

That part of the final judgment granting injunctive relief is directed at the federal defendants, not at the intervenors. The principle has long been established that a party not restrained by an injunctive order may not appeal therefrom. *Stearns-Roger Mfg. Co.* v. *Brown*, 114 Fed. 939, 942 (C.A. 8); *Milgram* v. *Loew's Inc.*, 192 F. 2d 579, 586 (C.A. 3); see *Chicago* v. *Chicago Rapid Transit Co.*, 284 U.S. 577; cf.

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[5] Originally, two non-Mississippi private schools were also named as intervenors. (J.S. App. A40, No. 1358.) The district court, however, limited this suit to the State of Mississippi; this was plainly a proper exercise of judicial discretion in the interest of sound judicial management and the efficient conduct of proceedings. See *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 43 F.R.D. 452, 463–464 (E.D. Pa.). Our arguments supporting the lower court's limitations on intervention are set forth in greater detail in our Motion to Dismiss in *Cannon* v. *Green*, No. 1358, October Term, 1969, pp. 8–14.

Queensboro Farms Products v. *Wickard*, 137 F. 2d 969, 977-978 (C.A. 2). Nor do the intervenors have a "direct and substantial personal interest in the outcome" which would enable them to appeal from that part of the final judgment granting declaratory relief as to the proper interpretation of the Internal Revenue Code. *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 83. The mere fact that the "remote consequence" of the judgment here might be to increase the tuition in the schools which the intervenors support or attend is not sufficient to allow an appeal. Cf. *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 Fed. 494, 499 (C.A. 9), mandamus and certiorari denied, 239 U.S. 641; *In re Michigan-Ohio Bldg. Corp.*, 117 F. 2d 191, 193 (C.A. 7); see also *Northern Pacific Railroad* v. *Patterson*, 154 U.S. 130; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.[6]

Moreover, the judgment of the district court in this case does not affect the ultimate right of any contributor to private, white segregated schools to claim deductions for contributions that he might make to such institutions. In such event, a refund suit or a Tax

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[6] *Pierce* v. *Society of Sisters*, 268 U.S. 510, relied on by the intervenors in their response to the defendants' opposition to their stay motion, is not to the contrary. The Court there held, on an appeal from a preliminary injunction, that a statute prescribing attendance for all minors at public schools would "without doubt * * * seriously impair, perhaps destroy, the profitable features of * * * [the] business" of the plaintiff's private schools. 268 U.S. at 531. Here, intervenors alleged merely that the withdrawal of exemption and deductibility rulings "could reasonably be expected" to result in a rise in their tuition (J.S. App. A17, No. 820).

Court action, whether by a contributor with respect to a deduction claim, or by a school with respect to a tax exemption claim, would provide an appropriate occasion for review of the issues which intervenors attempt to raise. See Internal Revenue Code of 1954, Sec. 6213; 28 U.S.C. 1346, 1491. Insofar as intervenors purport to protect the interests of the contributors or the schools, they "merely * * * [seek] reversal of an adverse precedent;" that is not an adequate basis for appeal.[7] *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 283; see Wolfson and Kurland, *Jurisdiction of the Supreme Court of the United States* (1951 ed.), pp. 541–553.

2. This Court is without jurisdiction to hear this appeal for a separate reason. Intervenors seek on ap-

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[7] The provision in 28 U.S.C. 1253, allowing "any party" to appeal an order denying an injunction, also cited in intervenors' response to our stay opposition, does not assist them here. The predecessor of Section 1253—the Act of August 24, 1937, c. 754, 50 Stat. 751—as introduced in the House, allowed a direct appeal only by the Attorney General (81 Cong. Rec., Part 3, p. 3269). The Senate placed the words "any party" in the statute for fear that allowance of an appeal by the Attorney General alone might raise constitutional problems. S. Rep. No. 963, 75th Cong., 1st Sess. pp. 2–4; Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 617–618, n. 70 (1938). The Senate Report clearly shows an intent to restrict appeals to persons with a "legal" or "probable interest," in accord with the Case or Controversy Clause of Article III. S. Rep. No. 963, *supra*, p. 2. Intervenors' interpretation would contravene this Court's repeated admonitions that Section 1253 should be narrowly construed to keep within narrow confines the appellate docket of this Court. *E.g.*, *Goldstein* v. *Cox*, 396 U.S. 471, 477–478.

peal (J.S. 20), as they did below, to obtain declaratory and injunctive relief requiring the defendant officials to reverse the policy of the Treasury Department relating to tax exemption and deductibility assurance rulings, and to allow exemptions to private, white segregated schools and deductions to contributors thereto (J.S. App. A45–A46, No. 1358). The courts are explicitly prohibited by statute from granting such relief.

Section 7421(a) of the Internal Revenue Code of 1954 provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." Unless there exist circumstances that forbode "ruination" for a complainant and demonstrate with certainty that the government will not prevail—which are plainly not present here—this Court has held that Section 7421(a) must be applied with full vigor in accordance with its terms. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1; see also *State Railroad Tax Cases*, 92 U.S. 575, 613-614. Even though the intervenors have not used the statutory words "assessment" or "collection" in their prayers for injunctive relief, their suit in fact seeks to restrain the assessment and collection of taxes from the relevant segregated private schools, and from contributors thereto. Their request for an order requiring issuance of tax exemption and deductibility assurance rulings to such schools is aimed directly at the procedural mechanism designed to accomplish the restraint on assessment and collection. See Rev. Proc. 69-1, 1969-1 Cum. Bull. 381; Rev. Proc. 69-3, 1969-1 Cum. Bull. 389; Rev. Proc. 68-17, 1968-1 Cum. Bull. 806.

In addition, the declaratory and injunctive relief sought by the intervenors in this suit is proscribed by the Declaratory Judgments Act, 28 U.S.C. 2201, 2202. Section 2201, which authorizes a declaratory judgment "[i]n a case of actual controversy within * * * [the court's] jurisdiction," specifically excepts suits "with respect to Federal taxes." In amending this provision to include the Federal tax exception, Congress was responding directly to several declaratory judgment suits that threatened to circumvent the 70-year-old prohibition, embodied in the predecessor of Section 7421, against judicial interference with "the orderly and prompt determination and collection of Federal taxes" other than through Tax Court or refund actions. S. Rep. No. 1240, 74th Cong., 1st Sess., p. 11 (1939-1 Cum. Bull. (Part 2) 651, 657).

Plainly, this intervenors' suit, aimed at restoring the tax exemptions and deductions of private, white segregated schools, and of the contributors thereto, is an action "with respect to Federal taxes" within the meaning of Section 2201. To be sure, intervenors request declaratory relief with respect to the taxes of others, rather than their own taxes. But the courts have properly held that the tax exception in Section 2201 bars declaratory relief not only with respect to the complainant's own tax, but also where the complainant asserts a collateral interest and seeks a declaration concerning the effect of the Internal Revenue Code, or of administrative action thereunder, on others. *Jolles Foundation* v. *Moysey,* 250 F. 2d 166 (C.A. 2); *Singleton* v. *Mathis,* 284 F. 2d 616 (C.A. 8); *Mitchell* v. *Riddell,* 402 F. 2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456; *Kyron Foundation, Inc.* v. *Dunlap,* 110 F. Supp 428 (D. D.C.); *Jules Hairstylists of Maryland, Inc.* v. *United States,* 268 F. Supp. 511 (D. Md.), affirmed *per curiam,* 389 F. 2d 389 (C.A. 4), certorari denied, 391 U.S. 934.

The Declaratory Judgment Act forecloses not only intervenors' prayer for declaratory relief, but also their request for injunctive relief. The injunction they seek merely constitutes additional relief "supporting" the requested declaratory judgment. (J.S. App. A45, No. 1358.) But the tax exception in Section 2201 is equally applicable to the "Further necessary or proper relief" supporting the declaration of rights, such as an injunction, authorized by Section 2202 of the Act.[8] S. Rep. No. 1005, 73rd Cong., 2d Sess., p. 6; *Jolles Foundation* v. *Moysey,* 250 F. 2d at 169; cf. *Jules*

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[8] For the reasons stated above, we believe that Code Section 7421(a) and 28 U.S.C. 2201 and 2202 should similarly bar plaintiffs' suit. We did not appeal the grant of declaratory and injunctive relief in favor of the plaintiffs, however, since the opinion and judgment below largely mirrored the Internal Revenue Service's policy and procedures with respect to schools having racially discriminatory admissions policies.

Hairstylists of Maryland, Inc. v. *United States, supra.*[9]

3. A third independent rationale requires dismissal of this direct appeal. Although intervenors name as defendants the Secretary of the Treasury and the Commissioner of Internal Revenue in their pleadings, their action is in fact against the United States, which has not consented to be sued.[10] It is clear that the United States may be sued only to the extent that it gives it consent. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682. In *Louisiana* v. *McAdoo,* 234 U.S. 627, this Court held that a non-taxpayer was barred by sovereign immunity from judicially challenging a Treasury interpretation of a tax statute as it affected another taxpayer. The Court reasoned that such suits by non-taxpayers concerning the tax liability of others (234 U.S. at 632):

> * * * would operate to disturb the whole revenue system * * * and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States. * * *

Intervenors may not avoid the sovereign immunity bar by phrasing their argument in First Amendment terms (J.S. 14–16). Their request for a restoration of the *status quo ante litem* would necessarily require the Internal Revenue Service to formulate an entirely new policy, and establish new procedures, relating to private schools having racially discriminatory admissions policies; it would also necessitate a repudiation of the significant steps[11] already taken to withdraw the tax exemption and deductibility assurance rulings from such schools. Such broad affirmative relief, which would alone give substance to intervenors' suit, is precluded by sovereign immunity notwithstanding the fact that the alleged violations are said to infringe on constitutional rights. *Larson* v. *Domestic & Foreign Corp., supra*, at 691, n. 11.

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[9] It is well settled that, for the purposes of the similar broad statutory prohibition on challenges to state tax statutes, ininjunctive and declaratory judgment actions must be treated as equivalents. See *Great Lakes Co.* v. *Huffman*. 319 U.S. 293, 298–301; *West Pub. Co.* v. *McColgan*, 138 F. 2d 320, 323–325 (C.A. 9); 6A Moore's *Federal Practice*, par. 57.18(1).

[10] This, of course, is also true with respect to plaintiffs' suit. But see n. 8, *supra*.

Nor may the bar of sovereign immunity be circumvented here by the argument that the defendant officials are not acting within their authority in interpreting the Internal Revenue Code as not extending tax benefits to schools, and contributors thereto, having racially discriminatory admissions policies. It is well settled that a Cabinet officer's performance of a statutory duty to interpret the law, even if the interpretation be erroneous, is an action of the sovereign which the courts may not enjoin. *Larson* v. *Domestic and Foreign Commerce Corp., supra*, at 690; *Dugan* v. *Rank*, 372 U.S. 609, 622; cf. *Hawaii* v. *Gordon*, 373 U.S. 57. There can be no doubt that the Commissioner's rulings here, with respect to Code Sections 170 and 501, were made pursuant to valid statutory authority. Code Section 7801 authorizes the Secretary of the Treasury to supervise the "administration and enforcement" of the tax laws; Section 7802 authorizes him to delegate duties and powers to the Commissioner of Internal Revenue; and Section 7805(a) specifically provides that "the Secretary or his delegate shall prescribe all needful rules * * * for the enforcement" of the tax laws. Finally, Code Section 6201 gives the Secretary or his delegate the essential authority "to make the inquiries, determinations, and assessments of all taxes * * * imposed by this title." Issuance of the rulings challenged here was but a continuation of the power exercised as early as 1792 by Treasury Secretary Hamilton in circulars informing collectors of the "true construction" of the revenue acts.[12] See Circular of August 27, 1792, reproduced in *The Work and Jurisdiction of the Bureau of Internal Revenue* (1948), p. 9.

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[11] See J.S. App. A40–A41, No. 71-425, for a summary of the steps taken prior to issuance of the final judgment below.

Moreover, the fact that the United States is exempt from suit in the instant case does not impose an undue hardship on the intervenors. As we earlier indicated, those directly affected by the Internal Revenue Service rulings—the schools and contributors thereto—may avail themselves of a Tax Court or a refund action in order to test the legality of the rulings. Cf. *Cary* v. *Curtis,* 3 How. 236, 245.

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[12] The ruling was made under the authority of Sec. 2 of the Act of September 2, 1789, c. 12, 1 Stat. 65, authorizing the Treasury Secretary to "digest and prepare plans for the improvement and management of the revenue * * * [and] to superintend the collection of the revenue." Cf. Revised Statutes, Sec. 248 (31 U.S.C. 1002); Act of May 9, 1792, c. 37, 1 Stat. 279, Sec. 6; Act of July 1, 1862, c. 119, 12 Stat. 432, Sec. 1.

CONCLUSION

The appeal from the final judgment of the district court should therefore be dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED B. UGAST,
Acting Assistant Attorney General.
ERNEST J. BROWN,
LEONARD J. HENZKE, Jr.,
Attorneys.

OCTOBER 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971

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Supreme Court, U.S.
FILED
NOV 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-425

DAN COIT, *et al.*,
Appellants,

v.

WILLIAM H. GREEN, *et al.*, and JOHN B. CONNALLY, JR.,
SECRETARY OF THE TREASURY, *et al.*
Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

REPLY TO MOTIONS TO DISMISS

GEO. STEPHEN LEONARD
Leonard, Clammer & Flues
1725 K Street, N. W.
Washington, D. C. 20006
Attorneys for Appellants

IN THE

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REPLY TO MOTIONS TO DISMISS

I

Appellants Show Both Constitutional and Economic Injury to Themselves. (Sol. Gen. Bf. 5-8, Green Bf. 6-7)

1. Showing economic injury, (a) appellant parents as intervenors are the class which "support[s]" the private white schools (Sol. Gen. Bf. 5), (b) by answer they pleaded the now denied economic and constitutional injury to themselves (Oct. Term 1969, No. 1358, *Cannon v. Green*, App. 41), (c) appellants placed in evidence in support of that averment seven unopposed affidavits (id. App. A19-39) attesting the consequential increase in tuition costs to themselves from a lessening of private gifts, and (d) the lower court recognized that the expected effect of its orders would be to "deter" such outside donations to their schools (id. A-76). The government argument that such a rise in tuition cost to appellants from the appealed injunction is merely a "remote consequence"

(Sol. Gen. Bf. 7) is not supported by either the record or the ruling of the lower court.

Equally on the law, contrary to the government's reading of the cited precedent, it is clear that this Court has repeatedly affirmed that a person who suffers a derivative economic injury through an erroneous constitutional determination as to a third party, has standing to appeal that holding, *Truax* v. *Raich*, 239 U.S. 33, 36 S. Ct. 7 (1915), *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965) (distinguishing *Tileston* v. *Ullman*, cited by the government, p. 6), *Barrows* v. *Jackson*, 346 U.S. 249, 255; 73 S. Ct. 1031, 1034 (1953). *Chicago* v. *Atchison, T & S.F.R. Co.*, 357 U.S. 77, 83; 78 S. Ct. 1063, 1067 (1958), cited by the Solicitor General, is directly in point. There Parmelee was held to have prospective economic injury and therefore to have appellate standing in this Court to question a constitutional determination allowing the favorable licensing of a competitor transfer agent, although the licensing regulation held invalid did not apply to Parmelee's operation.

In direct analogy, standing to complain of potential economic injury from governmental rulings sought by others has been frequently recognized by this Court in its intervention rulings, *Cascade Nat. Gas Corp.* v. *El Paso Nat. Gas Co.*, 386 U.S. 129, 87 S. Ct. 932 (1967); *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, 61 S. Ct. 666 (1941). Accord, *Nuesse* v. *Camp*, 385 F.2d 694 (D.C. Cir. 1967), *Silver* v. *Jordan*, 241 F.Supp. 576 (D.C. Cal. 1965) affd. 381 U.S. 415, 85 S. Ct. 1572 (1965), *Justice* v. *United States*, 365 F.2d 312 (6th Cir. 1966), *Atlantic Ref. Co.* v. *Standard Oil Co.*, 304 F.2d 387 (D.C. Cir. 1962).

Finally, it seems clear that the economic injury to these appellants is greater in amount and closer in degree of relation than the indirect taxpayer injury held sufficient for standing by this Court in First Amendment cases, *Flast* v. *Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968);

Walz v. *Tax Comm.*, 397 U.S. 664, 90 S. Ct. 1409 (1970); *Everson* v. *Bd. of Ed.*, 330 U.S. 1, 67 S. Ct. 504 (1947); *Cochran* v. *Bd. of Ed.*, 281 U.S. 370, 50 S. Ct. 335 (1930).

2. As to the constitutional injury, it is of course the appellants directly as individual citizens, rather than the corporate schools, that suffer the First Amendment abridgement of associational right by any closing of the schools supported and attended by them, *Pierce* v. *Society of Sisters, Pierce* v. *Hill Military Academy*, 268 U.S. 510, 45 S. Ct. 571 (1925). And the lower court's objective of using the tax laws selectively to compel conformity by appellants' private schools with the desegregation views expressed in the appealed order, is clear from their earlier opinion, *Green* v. *Kennedy*, 309 F.Supp. 1127, 1134-1140 (No. 1358, op. Cit. A67-78). The District Court there describes the financing difficulties which will be caused to these schools from its suspension of their educational exemptions. This is the measure of the abridgement of appellants' right, since the only alternatives given are to forego the beliefs expressed in the school's admission policy or suffer the loss or burdening of these schools relative to all other private schools which conform to the lower court's view of public policy.

To show lack of constitutionally significant injury Plaintiff-appellees state to this Court (Bf. 8)

> ". . . The Lamar School Foundation, has been deprived of its advance assurance of deductibility of contributions, not by the June 30 order of the District Court, but for failure [to] comply with the nondiscrimination policy of IRS voluntarily announced on July 10, 1970. Implementation of the District Court's order of June 30 can have no effect on the status of the institution."

intiffs are misinformed. We attach the notice of re-tion issued to Lamar School Foundation after a stay denied, Exh. A. It shows that the revocation was directly based on the injunction appealed from, not on the change of regulation.*

II

This Court's Jurisdiction is not Ousted by the Internal Revenue Code.

The government further argues the impermissibility of any suit for a declaratory tax judgment or tax collection restraint under 26 U.S.C. §§ 2201, 2202 and 7421 (a) (Sol. Gen. Bf. 9, 10-12).

1. The defenses if applicable, have been waived. The government raised the same defenses to the complaint in the District Court and was overruled, the appealed order being in terms

> ". . . a declaration that the Code requires the denial and elimination of Federal tax exemptions for racially discriminatory private schools . . ." (A8).

as required by the "constitutional caliber" of the plaintiff's rights (A50). The government here waives any appeal from that determination (Sol. Gen. Bf. 11, ftn. 8), reraising the issue *de novo* before this Court solely as to appellants. But the declaratory and injunctive relief prayed by appellants below and denied by the appealed order, was identical in character, if opposite in interpretation, to the relief granted to plaintiffs. Necessarily then, if these Code defenses are well founded against such a prayer for relief, then the court below lacked jurisdiction *ab initio*, had no power to issue the appealed order and the only appropriate procedure in this Court would be summary reversal and dismissal of the complaint, as was done in *Hampton* v. *St. L. Iron Mt. & S. Ry.*, 227 U.S. 456, 33 S. Ct. 263 (1913) cited on this point by the Solicitor General (Bf. 6).

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* Speaking outside the record, we know of no revocation issued under the new regulation.

On the facts the cited sections are inapplicable. re is no tax nor assessment identified, no party to appeal would be taxable in any event, and prospec- taxation is a conclusion which assumes that either non-party, non-profit schools themselves or some fu- unidentified donors will come within a taxable area. hort there is no pending or specific collection to be r restrained or interpreted. Under these circum- nces it is clear that § 7421 has no application, *Long Rasmussen, C.I.R.*, 281 F. 236 (9th Cir. 1922), *Roth- les* v. *Ullman*, 110 F.2d 590 (3d Cir. 1940), *Glenn Amer. Sur. Co.*, 160 F.2d 977 (6th Cir. 1947).

his also applies to §§ 2201 and 2202 which are lim- d to actions by taxpayers respecting their own assess- nts. The declaratory judgment is the correct proce- re to test the conflicting claims of the appellants and government to the anticipated funds from future nors, *Bullock* v. *Latham*, 306 F.2d 45 (2d Cir. 1962), re Judge Moore explains (p. 48) the distinction be- een this situation and that described in his own earlier inion in *Jolles Foundation* v. *Moysey*, cited by the vernment.

8. To support the argument that this proceeding is a eclaratory application for tax benefits, appellants are peatedly described as affirmatively seeking exemptions r their schools (Sol. Gen. Bf. 9-11). The record is to e contrary. Appellants cross-complaint asked relief olely against any *discriminatory* application of the tax aws,

> ". . . the defendants from time to time have publicly announced the possibility of their reconsideration of the existing policy with respect to § 501(c)(3), but only as regards schools having admission limited to white students and not as to schools having any other form of limitation. Such action, *if taken solely against private schools of [this] type* . . . would deprive all individual intervenors . . .

of the equal protection of the laws and would thereby penalize the exercise of their First Amendment freedoms of thought and association."

. . .

"Wherefor, intervenors pray . . . a declaratory judgment . . . [against] defendants' *discriminatory* reinterpretation of the revenue laws for the purpose of compelling the individual intervenors to withdraw their children from such schools or to embarrass the further operation of the schools." (Ans. of Appts. *Green* v. *Kennedy*, op. cit. A45-46).

III

The Defense of Sovereign Immunity is Immaterial and In any Event has been Waived.

The conflict between the Fifth Amendment claims of the public school black parents as plaintiffs and the First Amendment claims of the private school white parents as intervenors, was resolved by the appealed order in favor of the former. So long as the claims of either side are of the "constitutional dimension" found by the District Court, the role of the government as regulation maker is essentially ministerial rather than discretionary—as the lower court pointed out in enjoining any further changes of mind by Internal Revenue, *A36*. Accordingly its presence as an additional appellee on this appeal, while clearly desirable, is not a jurisdictional prerequisite to the requested review, particularly since it has not objected to the injunctive administrative directions issued to it by the District Court.

The lower court may have seen this defense in the same light, having disregarded it when raised against the plaintiffs below. Appeal from that implicit denial has been waived (Sol. Gen. Bf. 12 ftn. 10).

IV

On March 1, 1971, this Court noted probable jurisdiction on the constitutionality of withdrawing tax exemptions from a church-owned parking lot enterprise, *Diffendeifer and Paul* v. *Central Baptist Church of Miami*, No. 1042.

On March 29, 1971, this Court postponed consideration of probable jurisdiction on the constitutionality of withdrawing a liquor license from a white-only fraternal organization, *Moose Lodge No. 107* v. *Irvis*, No. 1292.

Appellants believe that the constitutional parameters of associational freedom and permissible state action in this appeal complement the above two situations, and present a third important aspect in the development of the recently announced *Walz* doctrine, suggesting the desirability of joint consideration.

Respectfully submitted,

s Geo. S. Leonard

GEO. STEPHEN LEONARD
Leonard, Clammer & Flues
1725 K Street, N. W.
Washington, D. C. 20006

Attorneys for Appellants

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EXHIBIT A

P. O. Box 737, Atlanta, Georgia 30301
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Oct. 19, 1971 In reply refer to:

[SEAL] 411-12:JEG

Lamar School Foundation
3300 32nd Avenue
Meridian, Mississippi 39301

Gentlemen:

Following the decree of the United States District Court for the District of Columbia in *Green* v. *Connally*, (Civil Action No. 1335-69, June 30, 1971), we advised you in a letter dated August 24, 1971, that the Court had ordered that every private school in the state of Mississippi must make a showing of a racially nondiscriminatory policy as to students and submit certain specified information to the Internal Revenue Service in order to retain recognition as exempt from Federal income tax. The Court further ordered that unless such showing was made within ninety days of the date of the Order, or within not more than an additional ninety days thereafter where the school showed cause for such an extension of time, the Internal Revenue Service was enjoined from continuing to recognize the school as tax exempt.

Ninety days have elapsed from the date of the Order and you have neither complied with its requirements nor shown cause for an extension of time.

Accordingly, in compliance with the Court's injunction, the ruling dated March 17, 1965, recognizing you as exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code is revoked.

In accordance with the provisions of section 7805(b) of the Internal Revenue Code, which permits the Internal Revenue Service to limit the retroactive effect of rulings, this revocation will be applied only to periods beginning after September 23, 1970, the date on which you were advised that the Internal Revenue Service proposed to revoke recognition of your exempt status because you were not operating on a racially nondiscriminatory basis as to students. You are required to file Federal income tax returns on Form 1120 for subsequent periods. Under the specific terms of the order, contributions to you after June 26, 1970, are not deductible by the donors under section 170(c) of the Internal Revenue Code.

Any questions about your Federal tax status or filing requirements should be directed to the District Director of Internal Revenue, Jackson, Mississippi.

Very truly yours,

s Bob N. Marsh
BOB N. MARSH
Acting District Director

FILED
NOV 23 1971
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IN THE

Supreme Court of the United States

No. 71-425

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WILLIAM H. GREEN, *et al.*, and JOHN B. CONNALLY, JR.,
SECRETARY OF THE TREASURY, *et al.*
Appellees.

SUPPLEMENTAL FILING BY APPELLANT
(Recent Cases)

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1. The United States District Court for the District of South Carolina on November 17, 1971 enjoined the Secretary of the Treasury and Commissioner of Internal Revenue from "revoking or threatening to revoke the [501(c)(3)] tax exempt status of . . ." a private university whose racially discriminatory admissions policy had religious connotations. The District Court distinguished the earlier decision in *Green* v. *Kennedy* (309 F. Supp. 1127) on the basis of the long established exemption of the plaintiff and the unavailability at that time of this Court's decision in *Walz* v. *Tax Commission*, 397 U.S. 664.

Bob Jones Univ. v. *John B. Connally, Sec. of the Treas.* and *Johnnie M. Walters, Comm. of Int. Rev.* (Civ. Act. 71-891, unreported).

2. To a contrary conclusion, the United States District Court for the Eastern District of Wisconsin, (3-judge) on October 18, 1971, held the tax exemption laws of Wisconsin to be unconstitutional under the Fourteenth Amendment "insofar as they permit tax exemptions for organizations which discriminate in membership on the basis of race." In its ruling that Court adopted the reasoning of the holding here appealed from:

> "Inherent in our decision and that in *Green* and in any distinction of *Walz*, *Chicago Joint Board* and *Bright*, is a determination that a different standard must be applied to ascertain state action in cases involving equal protection than in cases involving other rights. . . . Under the reasoning in *Green*, the grant of a tax exemption to such organizations is a significant state action encouraging discrimination in violation of the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment and must be enjoined."
>
> *Pitts, et al.*, v. *Wisconsin, et al.*, No. 69-C-260, unreported)

Respectfully submitted,

s/ Geo. S. Leonard
Leonard, Clammer & Flues
Attorneys for Appellants

23 Nov. 1971.

STATEMENT OF THE NATIONAL COUNCIL OF JEWISH WOMEN, INC., NEW YORK, N.Y.

The National Council of Jewish Women (NCJW) is deeply disturbed at the Administration's reversal of a long-standing federal public policy denying tax exempt status to private and non-profit institutions that practice racial discrimination and segregation. Throughout our 88 year history, NCJW, a volunteer organization of 100,000 members in 185 Sections across the country, has been concerned with the fundamental American priorities of individual liberties, and civil rights. We regard the recent action by the Administration as divisive and a serious threat to, and an erosion of, those rights.

When it adopted the Civil Rights Act of 1964, Congress clearly recognized the responsibility of the federal government to protect the rights of all its citizens and to ensure free access to the educational institution of their choice. In consonance with the intent of Congress, the federal courts and, ultimately the Supreme Court, have mandated the enforcement of the provisions of the Civil Rights Act by Executive Departments in such areas as tax regulation.

The public at large has been given the erroneous impression that the administration was acting on its behalf to prevent "the I.R.S. from determining national social policy all by itself." To this day, many people do not realize that the I.R.S. did not institute the practice, but was carrying out its Congressional and Court mandate to deny tax exempt status to private schools that practice racial discrimination in their admissions procedure. The I.R.S. revenue rulings were issued for public comment when first formulated and again when later revised. The procedure was open and consistent with Congressional intent to discourage racial discrimination. It is the action of the Administration, not the I.R.S., that blocks the intent of Congress and also denies the opportunity for judicial review of challenges to the I.R.S. rulings.

NCJW believes that the intent of Congress is clear in existing legislation and that tax exempt status should be denied to all private schools which practice racial discrimination.

NCJW, therefore, objects to the adoption of any further legislation which would duplicate, in essence, the Civil Rights Act of 1964. Instead, we believe that consideration of such measures by Congress encourages the Administration to avoid it responsibility to implement and carry out the will of Congress.

STATEMENT OF MAUDINE R. COOPER, VICE PRESIDENT FOR WASHINGTON OPERATIONS, NATIONAL URBAN LEAGUE, INC.

On behalf of the National Urban League, I am pleased to submit this testimony for the record of hearings held on the issue of the tax exempt status of private schools. The National Urban League is a non-profit, community service organization committed to securing equal opportunities and the full participation of blacks, the poor, and members of other minority groups in American life.

Our quest to achieve equal opportunity for the disadvantaged has progressed for over 70 years on a number of fronts and in a variety of arenas. Although we have not yet reached the pinnacle of a color blind society for which we strive, the last 20 years have been witness to some of the most substantial gains in our history. Through Congress, the courts, sensitive Administrations, and indeed public opinion, we have made notable strides in the areas of employment, social welfare, political participation, and relative to this case, education.

For these reasons, we are appalled that the Administration would consider withdrawing the ban on tax exemptions for institutions that practice racial discrimination or conversely, introduce legislation to "restore" the prohibition. Both actions effectively eschew a plethora of legislative action and court decisions that unequivocally deny this privilege to those that attempt to circumvent the law. We have been asked to take a quantum leap backward, and repeat or even rewrite past history. We cannot accept this selective reading of applicable law, but must ask members of the Committee to look at the record. The inescapable conclusion, we are sure, will be that the three branches of government have already addressed this issue, and further legislation would be at best superfluous, at worst, a signal to the country that this Administration is ignoring the letter and the spirit of the law.

Tax exempt status is a privilege granted by the Federal government, not a right to be enjoyed by any organization claiming to be charitable while flagrantly ignoring the law. Designation as a 501(c)(3) agency is justified by the belief that the government is compensated for the loss of the institution's tax revenue by the benefits which accrue from the group's promotion of the general welfare. Clearly, any school or organization that practices racial discrimination is not working for the general welfare, but rather is operating in a manner strictly antithetical to all citizens' best interests. The privilege of tax exempt status is one of the few tools at the government's disposal to discourage these segregation academies, for relieving an institution of social security and unemployment taxes can often spell its continuation or demise. It must continue to be availed, as in the past, to assure that the public good is served and not abused.

The history of judicial action on this issue is rooted in the 1954 *Brown* v. *Board of Education* decision. By declaring that separate is inherently unequal, the Supreme Court outlawed the existence of segregated schools. In the wake of the *Brown* decision, a multitude of so-called "seg academies" sprung up in an attempt to circumvent this mandate. Clinging to the first amendment's freedom of religion establishment clause, they attempted to continue to operate in a discriminatory manner. Now, in 1982, we are seeing the same phenomenon. Schools such as Bob Jones University, Goldsboro Christian Schools, and an estimated 100 others not only discriminate against blacks, but ask the government to provide succor for their efforts. We cannot allow over 25 years of progress, based on a substantial legislative and judicial record, to be eliminated.

In passing the Civil Rights Act of 1964, the Congress made its position known on this issue. In particular, Title VI specifically prohibits discrimination in Federally assisted programs. Congress has maintained this posture for 18 years, despite attempts to alter or eliminate the ban.

Clarification and precision were provided on the issue in the *Green* v. *Kennedy* class action brought in 1969 before the U.S. District Court for the District of Columbia. Parents of black school children in Mississippi sought to enjoin the Department of Treasury from granting tax exempt status to private schools that discriminated, based on violations of the Fifth Amendment, Title VI, and the Internal Revenue Code. A unanimous court issued a preliminary injunction and permanent injunction barred the IRS from granting tax exempt status to discriminatory private schools. The intervenors in *Green* v. *Connally* appealed, but the Supreme Court upheld the lower court decision in *Coit* v. *Green*. Subsequent courts have affirmed this ruling and assured that it was applied nationwide.

The IRS has consistently obeyed and implemented these edicts. As early as 1970, based on the court's preliminary injunction, the IRS ceased granting 501(c)(3) status to racially discriminatory schools. Consequently, President Reagan's contention that the IRS has been governing by "administrative fiat" is simply spurious. In fact, it is he who dares to rule this way, by ignoring a body of law and practice that is overwhelming.

To claim that the granting of tax exempt status is a procedural matter serves only to trivialize Congressional mandates, judicial decisions, and twelve years of procedure. The Congress must reject the tortured logic that suggests the enactment of additional legislation. The record is clear, and we fear the consequences of tinkering with the Constitution. Even more, we fear a revisionist perspective that would return this country to an unacceptable tolerance of segregation.

APPENDIX I

On February 25, 1982, the Department of Justice filed two motions with the Supreme Court in regard to the *Bob Jones* and *Goldsboro* cases. These motions informed the Court that the two cases are no longer moot because of an order issued by the District of Columbia Circuit Court on February 18, 1982, which prevents the Internal Revenue Service from granting tax exemptions to these two schools. Accordingly, the Department of Justice changed its litigating posture and informed the Court that it would be appropriate for the Court to proceed to adjudicate these cases and that the Government would file a brief on the merits. In addition, one motion supports the suggestion made by several amici curiae that the Court appoint counsel to argue in support of the decisions reached by the lower courts.

On February 26, 1982, the Department of Justice filed its brief on the merits. The brief supports the argument made by the schools that section 501(c)(3) of the Internal Revenue Code does not authorize the Internal Revenue Service to deny tax-exempt status in these cases, but it opposes the constitutional claim that the first amendment right to free religious belief and exercise guarantees tax-exempt status to such schools.

The motions filed on February 25, 1982, along with the Order issued by the U.S. Court of Appeals for the District of Columbia Circuit, on February 18, 1982, and the brief filed on February 26, 1982, follow:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE MOTION FOR DIVIDED ARGUMENT OUT OF TIME AND MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 38.4 and 42 of the Rules of this Court, the Solicitor General moves for leave to file a motion for divided argument out of time and moves for divided argument in the above-entitled cases.

The circumstances supporting our motion for leave to file this motion out of time are described in the detailed chronology of the developments in these cases set forth in our Motion for Leave to File Brief Out of Time.

The Brief for the United States that we seek leave to file out of time in these cases supports petitioners' argument that Section 501(c)(3) of the Internal Revenue Code does not authorize the Internal Revenue Service to deny them tax exempt status as "religious" or "educational" institutions because of their racially discriminatory policies. It therefore contends that the pertinent Revenue Rulings that were relied upon by the Commissioner of Internal Revenue to deny petititioners tax exempt status are based upon erroneous interpretations of the statute. However, the Brief for the United States opposes petitioners' constitutional claim that their First Amendment right to free religious belief and exercise guarantees them tax exempt status.

In light of the posture of the parties and the substantial public importance of the question presented, we agree with the suggestion of several _amici curiae_ that the Court should appoint counsel to argue in support of the judgments below. Since the government is supporting petitioners' statutory claim but opposing petitioners' constitutional claim, we suggest that it would be appropriate to allot 20 minutes of oral argument time to petitioners, 20 minutes to the United States, and 20 minutes to counsel appointed by the Court to argue in support of the judgments below.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General [*]

FEBRUARY 1982

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[*] The Solicitor General is disqualified in these cases.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME

Pursuant to Rule 42 of the Rules of this Court, the Solicitor General respectfully moves for leave to file the Brief for the United States on the merits in the above-entitled cases out of time.

On October 13, 1981, the Court granted the petitions for writs of certiorari and consolidated the cases to consider the correctness of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to petitioners, because of certain racially discriminatory practices, to deny them tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.).

On December 31, 1981, the Court granted our application for a ten-day extension of time to file our brief on the merits to and including January 10, 1982. By January 6, 1982, the government's brief had been prepared and was ready to be sent to the printer in order to meet the extended due date. That brief, however, was not filed. Instead, on January 8, 1982, we advised the Court in a Memorandum that since the filing of our brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to accord tax-exempt status to petitioners under Section 501(c)(3) of the Code, and to refund to them federal social security and unemployment taxes in dispute. We further advised the Court that the Treasury Department had commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners such tax exempt status. We therefore asked that the judgments of the court of appeals be vacated as moot.

Subsequently, on January 18, 1982, the President submitted proposed legislation to the Congress, which would give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private non-profit educational organizations with racially discriminatory policies. In a Supplemental Memorandum filed on February 4, 1982, we informed the Court of these developments, and appended thereto copies of the pertinent documents. Hearings on the President's legislative proposal were held by the Senate Finance Committee and the House Ways and Means Committee in early February 1982, and that proposal is now under advisement.

On February 18, 1982, the United States Court of Appeals for the District of Columbia Circuit in *Wright* v. *Regan*, No. 80-1124, pending on petition for a writ of certiorari, No. 81-970, directed the Secretary of the Treasury and the Commissioner of Internal Revenue "not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race *see Runyon* v. *McCrary*, 427 U.S. 160 (1976), by failing to maintain a 'racially nondiscriminatory policy as to students,' as that term is defined in the declaratory judgment in *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd mem. sub. nom. *Coit* v. *Green*, 404 U.S. 997 (1971)." A copy of that order is attached.

The District of Columbia Circuit's order in *Wright* changes the posture of these cases before the Court. In light of that court's order, the Secretary has determined not to grant or restore tax-exempt status to petitioners, or to revoke the pertinent Revenue Rulings, pending final disposition of these cases by this Court. Our previous suggestion of mootness is therefore no longer appropriate. In these circumstances, we believe it would be appropriate for this Court to proceed with adjudication of the issues on which certiorari was granted. We therefore seek leave to file our brief on the merits out of time. Copies of the brief will be filed and served in typescript this week, with printed copies to follow as soon as they are available.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General */

FEBRUARY 1982

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*/ The Solicitor General is disqualified in these cases.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1124 **September Term, 19** 81

Civil Action No. 76-1426

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1982

GEORGE A. FISHER
CLERK

Inez Wright, individually and on
behalf of her minor children,
Oscar Clay Renfro, Anthony Lee
Renfro, Lisa Marie Wright, and
Ephron Antoni Wright, Jr., et al.,
Appellants

v.

Donald T. Regan, Secretary of
the Treasury, et al.

No. 82-1134

Civil Action No. 69-01355

William H. Green, on his own behalf
and on behalf of his minor children,
et al.,
Appellants

v.

Donald T. Regan, as Secretary of
the Treasury of the United States,
et al.

BEFORE: Wright, Tamm and Ginsburg, Circuit Judges

ORDER

On consideration of movants' request for an injunction pending appeal in No. 82-1134, for an injunction under the "All Writs Act" to preserve the status quo and protect the potential effectiveness of this court's decision in No. 80-1124, and for consolidation of Nos. 82-1134 and 80-1124, it is hereby

ORDERED that the application to consolidate Nos. 82-1134 and 80-1124 is denied; and it is further

ORDERED that the motion for an injunction pending appeal in No. 82-1134 be referred forthwith to the motions panel for expeditious consideration; and it is further

No. 80-1124
82-1134

September Term, 1981

ORDERED that the motion for relief under the "All Writs Act" in No. 80-1124 be filed and that a response thereto by the Secretary of the Treasury and the Commissioner of Internal Revenue be filed within fifteen days of the date of this order; and it is further

ORDERED, that to preserve the status quo pending response to the motion in No. 80-1124 and, thereafter, the court's determination of its authority to consider and decide the issues presented, see United States v. United Mine Workers, 330 U.S. 258 (1947), the Secretary of the Treasury and Commissioner of Internal Revenue are directed not to grant or restore federal tax-exempt status pursuant to 26 U.S.C. § 501(c)(3) to any school that unlawfully discriminates on the basis of race, see Runyon v. McCrary, 427 U.S. 160 (1976), by failing to maintain a "racially nondiscriminatory policy as to students," as that term is defined in the declaratory judgment in Green v. Connally, 330 F.Supp. 1150, 1179 (D.D.C.), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971).

Per Curiam

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHAS. JUSTIN COOPER
Special Assistant to the
Assistant Attorney General

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Internal Revenue Service had authority under Section 501(c)(3) of the Internal Revenue Code of 1954 to revoke the petitioners' tax-exempt status on grounds that private schools operated by petitioners had racially discriminatory policies and practices that contradicted national policy.

2. If the Service was authorized to enforce national policy in this manner, does the fact that the petitioners' practices were based on religious doctrine prevent the revocation action under the First Amendment.*/

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*/ This brief sets forth the position of the United States on both questions presented. The Acting Solicitor General fully subscribes to the position set forth on question number two, only. His views on question one are set forth in the Brief for the United States filed in this Court in September 1981 in response to the petitions for certiorari in these cases. Those views are more fully developed in a draft brief on the merits which was ready to be printed for timely filing in early January 1982. Copies of that draft brief were furnished by the Department of Justice in late January 1982, pursuant to request, to the Senate Finance Committee and the House Ways and Means Committee, along with other documents requested by those committees.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

No. 81-1

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FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court dated December 26, 1978 (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion and order of the district court dated May 14, 1979 (Pet. App. A72-A86) are not reported. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F. 2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-3. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are Sections 170(a), 170(c), 501(a), 501(c)(3), 3121(b)(8)(B) and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.), and Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.).

STATEMENT

A. Bob Jones University - No. 81-3

1. Petitioner Bob Jones University is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * * " (Pet. App. A2-A3, A40-A41).[2] Petitioner provides instruction for students from kindergarten through college and graduate school, enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects (Pet. App. A3, A41; J.A. A63, A127-A128, A153, A211-A223). At the college

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[2] Unless otherwise indicated, "Pet. App." and J.A. references in this portion of the Statement are respectively to the appendix to the petition and the joint appendix in *Bob Jones University* (No. 81-3).

level, it operates a school of education, a school of fine arts, a school of religion, a college of arts and sciences, and a school of business administration (J.A. A63, A127-128). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (J.A. A227).

Petitioner also offers a separate nondegree, noncredit program entitled Institute of Christian Service, for persons who do not wish to undergo the rigors of academic pursuit (J.A. A75). The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4). However, more than 100 denominations are represented in the student body (J.A. 84).

Petitioner maintains a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. This policy is based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures (Pet. App. A43). Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of the university for at least four years (id. at A4, A43). See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). At that time, it was petitioner's judgment that, while a policy of excluding blacks altogether was not doctrinally required, denying admission to unmarried blacks was the best means of implementing its prohibition against interracial dating and marriage (Pet. App. A43; J.A. A71-A72, A81-A82, A250; A209-210, 212).[3]

In response to decisions of the court of appeals in *Bob Jones University* v. *Johnson*, 529 F.2d 514 (4th Cir. 1975), and of the Supreme Court in *McCrary* v. *Runyon*, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), petitioner revised its admissions policy to permit unmarried blacks as well as married blacks to matriculate (Pet. App. A4, A43-A44; J.A. A250-A253). It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage, and it established disciplinary rules requiring the expulsion of any student who: (1) was a partner in an interracial marriage; (2) was affiliated with a group or organization advocating interracial marriage; (3) engaged in interracial dating or (4) encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A43-A44; J.A. A53-A54, A77-A80, A197-A198, A208-A209, A277). The university required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions (Pet. App. A42-A43; J.A. A132-A133).

2. Prior to 1970, the Internal Revenue Service ("Service") recognized petitioner as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code"). See *Bob Jones University* v. *Simon*, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer

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[3] "A." refers to the separately bound record appendix filed in the court of appeals, Nos. 79-1215 and 79-1216.

accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies, and that it would not continue to treat gifts to such schools as deductible contributions under Section 170.[4] See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230.

In November, 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including petitioner, announcing its new policy and requesting proof of nondiscriminatory admissions practices (J.A. A232-A234). Petitioner responded that it did not admit black students and, in September, 1971, further stated that it had no intention of altering that policy. The Service therefore commenced administrative proceedings leading to the revocation of petitioner's tax exemption and of its advance assurance of deductibility.

In January 1976, after petitioner's attempt to enjoin the administrative proceedings had failed in the Supreme Court, (see *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 735),[5] the

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[4] The Service's interpretation of Section 501(c)(3) was spurred by litigation. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), summarily aff'd per curiam *sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under Section 501(c)(3) to private schools in Mississippi that discriminated against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501 (c)(3), but reversed its legal position "in the midst of [the] litigation." 330 F. Supp. at 1156. As subsequently observed by this Court, the Court's summary affirmance of *Green* "lacks the precedential weight of a case involving a truly adversary controversy," and leaves open the question of whether a racially discriminatory private school is eligible for tax exemption under Section 501(c)(3). *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974).

[5] While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner sought injunctive relief to prevent the Service from taking final action on the revocation. *Bob Jones University* v. *Simon*, *supra*, 416 U.S. 725. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioners here.

Service issued a final notice of revocation, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

3. Seeking reinstatement of its tax exemption, petitioner initiated suit in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40).[6] The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (ibid.). Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized and operated exclusively for religious and educational purposes, and that petitioner was not required to demonstrate a nondiscriminatory racial policy in order to so qualify (Pet. App. A45-A71).[7]

The district court explained that Section 501(c)(3) does not endow the Service with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over the breadth of such power, the district court observed (id. at 467): "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action -- a dilemma of constitutional proportions. Citizens could no longer rely on the law of §501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny."

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[6] Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

[7] In a separate suit against the Secretary of the Treasury and the Commissioner of Internal Revenue instituted by petitioner, the district court thereafter ordered those officials to restore petitioner's tax-exempt status and to publish advance assurances of deductibility of contributions to petitioner (Pet. App. A72-A86).

A majority of the Fourth Circuit Court of Appeals reversed. Relying on the three-judge district court's decision in *Green* v. *Connally*, *supra*, the majority agreed with the Service that Section 501(c)(3) must be interpreted as incorporating the common law of charitable trusts as a gloss on each of the separately enumerated exemptive purposes in the statute. The panel majority further agreed with the *Green* conclusion (330 F. Supp. at 1156-1160) that to be eligible for tax-exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (Pet. App. A7-A8) (footnote omitted). It observed that "[t]his view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable'" (Pet. App. A7-A8, n.6).

To buttress the conclusion that Section 501(c)(3) establishes a public policy test, the majority also relied on the following excerpt from a 1939 House Report explaining the theory animating Congress to exempt from taxation organizations devoted to charitable and other purposes:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). 8/ Because petitioner's discriminatory practices violate clearly defined public policy rooted in the Constitution, federal prohibitions against federal assistance to racially discriminatory schools, and a federal statute (42 U.S.C. 1981) proscribing private acts of racial discrimination, the court of appeals concluded that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the majority rejected petitioner's argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit petitioner from adhering to its teachings nor force any individual student to violate his beliefs (Pet. App. A13-A14). With respect to petitioner's Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16) (emphasis in original).

Judge Widener dissented (Pet. App. A18-A37), concluding that "Bob Jones University is a religious organization" (Pet. App. A19) within the meaning of Section 501(c)(3), and that the panel majority, the Service, and the district court in Green v. Connally, supra, had misconstrued Section 501 (c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt must also be "charitable" organizations under the common law of charitable trusts. (Pet. App. A19-A20). Section 501(c)(3), Judge Widener observed, grants tax-exempt

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8/ The majority miscites the House Report as "H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939)."

status to each class of organization enumerated in the statute, and because petitioner falls within one of those classes ("religious"), the IRS lacked authority to deny the exemption granted by Congress (Pet. App. A20). Judge Widener further asserted that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private, non-tax-funded religious institutions.

B. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc., is a North Carolina nonprofit organization incorporated in 1963 "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *" (Pet. App. 6a).[9] At least since 1969, petitioner has maintained a regularly enrolled student body (750 students in 1973-74) for kindergarten and grades one through twelve (Pet. App. 7a; J.A. 6-7), and has satisfied the requirements of North Carolina for secular education in private schools (See N.C. Gen. Stat. § 115-255 (1978 repl.)). Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. In keeping with petitioner's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, petitioner's practice is to begin each class with a prayer (Pet. App. 6a-7a).[10]

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[9] Unless otherwise indicated, "Pet. App." and "J.A." references in this portion of the Statement are respectively to the appendix to the petition and record appendix in Goldsboro Christian Schools (No. 81-1).

[10] Although the Second Baptist Church of Goldsboro was active in petitioner's founding and operation, petitioner was incorporated as a separate legal entity (Pet. App. 6a-7a; J.A. 5-6).

Petitioner does not require that its students profess or subscribe to any particular belief. It does require, however, that its students adhere to certain standards of conduct that are consistent with the tenets held by petitioner (J.A. 68). Various religious denominations are represented in the student body (J.A. 69-70).

Based upon its interpretation of the Bible, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God" (J.A. 10). Notwithstanding this policy, petitioner has accepted noncaucasions. Its policy in practice requires the exclusion only of members of the Negro race (Pet. App. 7a). Petitioner's president and principal believe that black students would be disinclined to abide by its tenets and practices because of the racial climate prevailing in the country and the pressures exerted by the positions of certain "militant" organizations (J.A. 81-93).

2. Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that petitioner did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the 1954 Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the 1954 Code, and, in 1974, he assessed FICA and FUTA taxes against Goldsboro.

3. After making partial payment, petitioner instituted suit in the United States District Court for the Eastern District of North Carolina, seeking a refund of $3,459.93 of withheld federal social security and unemployment taxes for 1969 through

1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a). On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied petitioner tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because petitioner's racially discriminatory admissions policy violated the declared public policy of the United States.

A majority of the Fourth Circuit Court of Appeals affirmed (Pet. App. 1a-3a). Finding the case "identical" to the Bob Jones University case, the court of appeals majority upheld the denial on the authority of that precedent. Judge Field dissented for the reasons stated by Judge Widener in his dissenting opinion in Bob Jones University (Pet. App. 3a).

SUMMARY OF ARGUMENT

In 1970, the Internal Revenue Service reversed its longstanding practice under Section 501 (c) (3) of the Internal Revenue Code of granting tax exemption to private educational institutions, without regard to their admissions policies, and announced that such institutions would no longer receive exemptions, and related tax benefits, if they discriminated on the basis of race. While recognizing and fully subscribing to the strong national policy in this country against racial discrimination in any and all forms, it is the position of the United States that this change of position by the Service finds no support in the language of Section 501 (c) (3), or in its legislative history.

Under Article I of the Constitution and the Sixteenth Amendment, Congress has the power "to lay and collect" taxes, not the Executive Branch. As an exercise of that power, Congress has directed the Internal Revenue Service in Section 501 (c) (3) of the Code to award tax exemptions, and related tax benefits, to private corporations pursuing any one of eight enumerated purposes, including, "educational" purposes. Nowhere has Congress qualified that grant of authority by providing that an institution eligible for exemption as "educational" can nonetheless be denied exempt status on public policy grounds, or because the institution is not also "charitable" in the common law sense.

This is not to suggest that Congress cannot legislate in such a manner, but only that it thus far has not done so. In this regard, we do not find sufficient evidence of affirmative action by Congress since 1970 to warrant the conclusion that the IRS practice now under attack has received legislative ratification. Thus the denial of tax exceptions to Bob Jones University and Goldsboro Christian Schools is, we submit, unauthorized agency action that should not, in the absence of congressional action, be countenanced. Neither the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, nor prior case law compels any different result.

In the event that the Court should disagree with the government's foregoing statutory construction argument and conclude that Section 501 (c)(3) of the Code authorizes the administrative denial of tax exempt status to private schools that engage in racially discriminatory policies and practices, we agree with the court below that such a denial violates no First Amendment rights of petitioners under either the Free Exercise Clause or the Establishment Clause. Assuming that petitioners' racial discrimination is motivated by sincere religious beliefs, the court below noted that the Internal Revenue Service's policy would not prohibit petitioners from adhering to their teachings or force any individual student to violate his beliefs (Pet. App.

A13-A14). The Fourth Circuit further concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original). The United States believes these conclusions to be correct and therefore agrees that the court of appeals properly disposed of petitioners' First Amendment claims.

ARGUMENT

I. THE LANGUAGE AND LEGISLATIVE HISTORY OF SECTION 501(c)(3) SHOW THAT THE COMMISSIONER DOES NOT HAVE THE DISCRETION TO DENY TAX EXEMPT STATUS TO OTHERWISE EXEMPT ORGANIZATIONS FOR FAILURE TO CONFORM TO NATIONAL POLICY WITH RESPECT TO RACIAL DISCRIMINATION.

Congress, the Courts and all recent Administrations have established a firm and uncontrovertible national policy against racial discrimination. This policy continues to guide all federal activities. The question addressed in the first portion of this brief is the interaction of that policy with the administrative enforcement of the nation's revenue code. In the succeeding sections we argue -- contrary to the Government's position below -- that Section 501(c)(3) does not permit the Commissioner of Internal Revenue to withhold congressionally authorized tax exemptions from otherwise qualified "religious" and "educational" organizations based solely on an administrative determination of failure to conform to the national policy. Our contention is, not that the policy which we fully accept and implement is wrong, but that the Internal Revenue Code -- from which all the Commissioner's authority is derived -- neither authorizes nor contemplates this kind of broad administrative discretion.

The threshhold legal question presented is one of statutory construction: Did Congress intend to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that maintain racially discriminatory admissions policies or other racially discriminatory practices? In answering this question affirmatively, the court of appeals, principally in reliance on the district court in Green v. Connally, supra, concluded (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable", and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common-law sense -- that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy. This construction of Section 501(c)(3) is at odds with the statute's language, its legislative history, and other objective evidence of legislative intent, and it should not be accepted by this Court.

1. The search for congressional intent must, of course, begin with the words of the statute itself. See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, _____ (1981); United States v. Oregon, 366 U.S. 643, 648 (1961). Section 501(c)(3) exempts from taxation "[c]orporations * * * organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, * * * or for the prevention of cruelty to children or animals * * * ." 26 U.S.C. (Supp. I 1971 ed.) 501(c)(3) (emphasis supplied).

By its very terms, the legislative enumeration of eight purposes or functions entitling nonprofit corporations to tax-exempt treatment is framed in the disjunctive, thus manifesting Congress' intent to accord tax-exempt status to any organization organized and operated for any one of the designated purposes or functions. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise"). The distinct references in Section 501(c)(3) to "educational" or "charitable" organizations confirms "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." Prince Edward School Foundation v. United States, 450 U.S. 944, 947 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

This reading of Section 501(c)(3) assigns to the words used by Congress their ordinary meaning. It is reinforced by the settled canon of statutory construction requiring that related statutory provisions be interpreted together. Kokoska v. Belford, 417 U.S. 642, 650 (1974); United States v. Cooper Corp., 312 U.S. 600, 606 (1941). Sections 503, 504, and 513 of the 1954 Code, sister provisions of Section 501(c)(3), reiterate the separate and disjunctive purposes or functions described in Section 501 (c)(3), thereby underscoring the congressional intent to recognize each category enumerated in Section 501(c)(3) as a discrete and independent "basis for * * * exemption under Section 501(a)." See 26 U.S.C. 503(b)(3), 504(a)(1) and (3), and 513(a) (1964 ed.).

In this regard, prior to 1969 Section 503 denied tax-exempt status to an organization otherwise qualified under Section 501(c)(3) if it engaged in certain prohibited transactions.[11] Section 503(b) provided in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) * * * except --
>
> (1) a religious organization * * *;
>
> (2) an educational organization * * *;
>
> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; * * * [emphasis supplied]

The language underscored above, which also appeared in the pre-1969 versions of Sections 504(a)(1) and (3),[12] and appears in the current version of Section 513(a),[13] plainly reflects Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501, and (2) that each purpose or function constitute a sufficient and independent basis for exemption under Section 501(a).[14]

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[11] References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

[12] Section 504(a)(1) and (3) provided for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> unreasonable in amount or duration in order to carry out the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) of an organization described in section 501(c)(3); or * * *
>
> * * * * *
>
> (3) * * * invested in such a manner as to jeopardize the carrying out of the charitable, educational, or other purpose or function constituting the basis for exemption under section 501(a) of an organization described in section 501(c)(3).

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code. This Section 504 was repealed by Congress in 1969. Pub. L. No. 91-172, Section 101(j)(15), 83 Stat. 527.

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[13] Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511 (which imposes a tax on unrelated business income of otherwise tax-exempt organizations) means "any trade or business the conduct of which is not substantially related * * * to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501 (or, * * * to the exercise or performance of any purpose or function described in section 501(c)(3)), * * *". Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

[14] Regulations promulgated by the Internal Revenue Service also reflect an interpretation of the statutory language as affording tax-exempt status to any organization qualifying under one of the categories enumerated in Section 501(c)(3), without regard to whether it also accords with the characteristics of a common-law charity. Under Section 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for *one or more of the following purposes*: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. 1.501 (c)(3)-1(d)(1)(i) (emphasis supplied). The regulations state further that

> [s]ince *each* of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. * * * For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it is "charitable".

26 C.F.R. 1.501(c)(3)-1(d)(1)(iii) (emphasis supplied).

Nonetheless, the Fourth Circuit Court of Appeals read Section 501(c)(3) to provide tax-exempt status only to institutions that are organized and operated for one of the designated purposes and are also qualified as common-law charities. In support of this interpretation, the court cited Section 170 of the 1954 Code, which, it asserted, "places the separately enumerated purposes in [§ 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." 639 F.2d at 151 n.6. The plain terms of Section 170, however, contradict the court's construction of Section 501(c)(3).

Subsection (c) of Section 170 defines "charitable contributions" in relevant part as follows:

> (c) Charitable contribution defined.
>
> For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of --
>
> * * * * *
>
> (2) A corporation, trust, or community chest, fund, or foundation --
>
> * * * * *
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * or for the prevention of cruelty to children or animals; * * *.

26 U.S.C. 170 (emphasis supplied). The definition of the term "charitable contribution" relates solely to Section 170, and derives its meaning in part on the basis of the purposes for which certain organizations are organized and created; namely, "religious, charitable, scientific, literary, or educational [or specified other] purposes." Each of these distinct purposes separately and independently qualify an organization to receive "charitable contributions".

Nothing in Section 170, so much as hints at the proposition advanced below that because an organization becomes eligible to receive what the drafters of Section 170 have chosen to call "charitable contributions", that organization automatically becomes endowed with a "charitable" purpose within the meaning of Section 501 (c) (3). Nor has Congress signalled elsewhere that it intended Section 170 to be so interpreted. Reliance by the court of appeals on this particular section of the Code is therefore misplaced. [15]

Based on the foregoing, the plain language of Section 501(c)(3) and its sister provisions, the structure of the 1954 Code, and the Service's interpretive regulations require the conclusion that Congress intended to afford tax-exempt status to any organization organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

In sum, "Congress has spoken in the plainest of words" (_TVA_ v. _Hill_, 437 U.S. 153, 194 (1978)) in Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational." 16/ The contrary reading of the legislation by the Fourth Circuit is incorrect.

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[15] Moreover, if all organizations which receive "charitable contributions" were required to conform to common-law notions of charity, the requirement of Section 170(c)(2)(C) -- that no part of the earnings of an organization which receives "charitable contributions" may "inure[] to the benefit of any private shareholder or individual" -- would be superfluous. _See_ p.

2. Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, see, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976); United States v. Oregon, 366 U.S. 643, 648 (1961), a review of that history provides no support for the construction of Section 501(c)(3) endorsed by the court of appeals.

16/ Even if one assumes that Congress did intend all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus betray a fundamental axiom of statutory construction: statutes are to be construed to give effect to each word, and no one part of a statute should be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-308 (1961); United States v. Menasche, 348 U.S. 528, 538-539 (1955).

Notably, the Service followed this axiom during the initial period of Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than in its common-law sense. See e.g., I.T. 1800, II-2 Cum. Bull. 152, 153, (1923), discussing the intended meaning of the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 (Section 501(c)(3)'s predecessor). This contemporaneous administrative interpretation of the statute clearly is not without significance. Power Reactor Development Co. v. Electricians, 367 U.S. 396, 408 (1961). See NLRB v. Boeing Co., 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference * * * "). See also discussion in text at pp. 20-23, infra.

The exemptions from taxation now contained in Section 501 (c)(3) originated as a part of the Tariff Act of 1894, ch. 349, 28 Stat. 556,[17] which provided in pertinent part: "[N]othing herein contained shall apply to * * * corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes." There is no indication in the legislative history that Congress incorporated, or had reference to, the "common law of charitable trusts" in enacting this taxing statute.

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, Section II, 38 Stat. 114, 166. Section II(G)(a) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual * * *.

This legislation broadened the 1894 exemption to include "scientific" corporations, and added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, however, income of a charity could not inure to the benefit of a private person. See 4 Scott, The Law of Trusts § 376 (2d ed. 1956).

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[17] This income tax act was later declared unconstitutional by the Supreme Court in Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895).

There obviously would have been no need to include such a requirement in the statute if Congress had intended to condition tax exemption on satisfying the requirements of a common-law charity.

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 18, Section 231(6), 40 Stat. 1076, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 136, Section 231(6), 42 Stat. 253, further expanded the statute to exempt "any community chest, fund, or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common-law sense. Moreover, as previously noted, supra at n.16, in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932, 18/ and regulations issued by the Service under

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18/ Revenue Act of 1924, ch. 234, Section 231(6), 43 Stat. 282; Revenue Act of 1926, ch. 27, Section 231(6), 44 Stat. 40; Revenue Act of 1928, ch. 852, Section 103(6), 45 Stat. 813; Revenue Act of 1932, ch. 209, Section 103(6), 47 Stat. 193.

those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (1924 Revenue Act). "Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor".[19/]

The Revenue Act of 1934, ch. 277, Section 101(6), 48 Stat. 700, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization can involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement would have been unnecessary if Congress had intended for all organizations to qualify as common-law charities in order to be exempt from taxation. See 4 Scott, The Law of Trusts § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 690, Section 101(6), 49 Stat. 1674, and the Revenue Act of 1938, ch. 289, Section 101(6), 52 Stat. 481, also carried forward the same exemption, and the regulations promulgated under these Acts continued to define the term "charitable" as "relief of the poor." See Treas. Reg. 86, Art. 101(6)-1 (1934 Revenue Act); Treas. Reg. 94, Art. 101(6)-1 (1936 Revenue Act); Treas. Reg. 101, Art. 101(6)-1 (1938 Revenue Act).

[19/] Treas. Reg. 69, Art. 517 (1926 Revenue Act); Treas. Reg. 74, Art. 527 (1928 Revenue Act); Treas. Reg. 77, Art. 527 (1932 Revenue Act).

In the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the 15 years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" in its popular and ordinary sense. See Treas. Reg. 103, §19.101(6)-1 (1939 Code); Treas. Reg. 111, §29.101 (6)-1 (1939 Code); Treas. Reg. 118, §39.101(6)-1(b) (1939 Code). 20/

Section 501(c)(3) of the 1954 Code, ch. 736, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety." In addition, Congress tightened the restrictions on political activities of tax-exempt organizations. 21/

20/ The House Report to the 1939 Code explained that tax exemptions are granted by Congress to certain types of organizations in recognition of their performance of functions that promote the general welfare and that might otherwise be provided by the government. See pp. 7-8, supra. Contrary to the court of appeals' suggestion in the Bob Jones University case (Pet. App. A8), the Report does not indicate that Congress intended to endow the Internal Revenue Service with authority to disqualify a designated organization from tax-exempt status upon an agency determination that one or more of the organization's practices affronted an agency concept of federal public policy as informed by the "general welfare." To the contrary, Congress made a determination that organizations within the terms of Section 501(c)(3) advance the general welfare, and did not invest the Service with authority to determine on a case-by-case basis whether particular practices of a qualifying organization sufficiently detracted from the general welfare to warrant denial of a tax exemption.

21/ The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from sections 101 and 421 of the 1939 Code. No change in substance has been made except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis supplied).

It was not until 1959 that the Internal Revenue Service undertook to expand its interpretation of "charitable." In Section 1.501(c)(3)-1(d)(2) of its 1959 Regulations, the Service concluded:

> The term "charitable" is used in section 501 (c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency * * *.

The purpose of this regulation is to clarify that the meaning of "charitable" is not "limited by the separate enumeration in Section 501 (c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant in the statute. Notably, the regulation does not suggest that organizations devoted to other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also serve "charitable" purposes.[22/] Indeed, the same regulation defines "educational" without reference to the notion of charity:

> The term "educational", as used in section 501(c)(3), relates to --
>
> > (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
> >
> > (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

26 C.F.R. 1.501(c)(3)-1(d)(3) (1959) (emphasis supplied).

The record is thus overwhelming that, since 1894, Congress has consistently and repeatedly manifested an intent to exempt from income taxation corporations organized for purely "educational" or "religious" purposes, as well as corporations organized for purely "charitable" purposes.

[22/] Were the Service's regulations to be so interpreted they would be inconsistent with the plain language of Section 501 (c)(3) and would have to fall. The Supreme Court outlined the limits of the Executive's interpretive powers in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 134 (1936):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

The Commissioner of Internal Revenue so construed Section 501(c)(3) and its predecessors until 1970 -- some 57 years after Congress' initial enactment of the relevant statutory language in the Tariff Act of 1913. An administrative reversal of position so many years later provides no legal basis for ascribing to a much earlier Congress an intent patently at odds with the very words of the statute.[23]

3. The court of appeals, following the district court in Green, held otherwise largely on the strength of Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958), which is said to stand for the proposition that "tax benefits such as deductions and exclusions generally are subject to limitation on public policy grounds" (Pet. App. A8). In Tank Truck, the taxpayer urged that fines paid for violating state maximum weight laws were "ordinary and necessary" expenses and thus allowable as deductions from gross income under the predecessor to Section 162(a) of the 1954 Code.[24] The Supreme Court affirmed the Commissioner's disallowance of the deduction, holding that an expense is not "necessary" to the operation of a business "if allowance of the deduction would frustrate sharply defined

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[23] Obviously, the Commissioner's 1970 revenue ruling does not even arguably qualify as "a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent," National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979).

[24] The fines assessed against the taxpayer were for violations of penal statutes enacted to protect state highways from damage and to ensure the safety of highway users.

national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 33. Observing that "[d]eduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature," the Court concluded that Congress did not intend to allow income tax deductions for fines incurred to punish violations of state penal laws. 356 U.S. at 35-36.

Unlike the explicit limitation placed by Congress on the deductibility of business expenses (i.e., that they be "ordinary and necessary"), tax-exempt status under Section 501(c)(3) is accorded to "corporations * * * organized * * * for * * * educational purposes" simpliciter. No similar "ordinary and necessary" standard applies under the exemption statute so as to warrant the court of appeals' reference in this context to the wholly separate statutory construction question involved in Tank Truck. Indeed, even in the context of "ordinary and necessary" business deductions under Section 162(a), the Supreme Court has admonished that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined." Commissioner v. Tellier, 383 U.S. 687, 691, 693-94 (1966). As the Tellier Court noted (ibid.):

> [T]he federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes.

Moreover, Congress circumscribed the denial of tax deductions on grounds of public policy in the aftermath of Tank Truck.

In 1969 and 1971, Congress enacted rules explicitly limiting the public policy doctrine of nondeductibility to fines paid for violations of law and to illegal bribes, kickbacks, and similar payments. See 26 U.S.C. 162(c) and (f). The Senate Finance Committee's report (No. 91-552) accompanying the 1969 enactment stated: "Public policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions." 1969-3 Cum. Bull. 423, 597 (emphasis supplied). See Bittker and Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51, 75 (1972).

In light of these subsequent developments, the public policy doctrine announced in Tank Truck -- even if transferable in its severely narrowed form to the present situation (which it is not) -- provides no meaningful support for the result reached below. Instead, resolution of the statutory issue depends on the language of Section 501(c)(3) and its history. We have already shown where the legislative analysis leads, and that reading of the statute must prevail until amended or altered by explicit congressional action.

4. No such subsequent legislation has been passed, and, to the extent that Congress has visited the tax exemption question since 1970, there is no basis to conclude that it has ratified or otherwise acquiesced in the construction given Section 501(c)(3) by the _Green_ court and the Fourth Circuit

a. As Judge Widener noted in dissent (81-3 Pet. App. A28-A31), Congress has expressed misgivings regarding the Service's recent activities in the area of tax exemptions to private schools. In 1978 and 1979, the Service sought to supplement its procedures for verifying whether the actual practices of private schools conformed to the schools' announced policies of nondiscrimination. 43 Fed. Reg. 37296-37298 (1978); 44 Fed. Reg. 9451-9455 (1979). The controversial nature of those proposals prompted congressional hearings. _Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means_, 96th Cong., 1st Sess. (1979). While some of the witnesses testifying at those hearings assumed that Section 501(c)(3) authorized the Service to deny tax exemptions to private schools with racially discriminatory policies (see, _e.g._, _id_. at 1176), other witnesses indicated that the Service had no such power (see _e.g._, _id_. at 586).

In response to the controversy over the proposed revenue procedures, Congress acted to prevent the Service from enforcing its proposed regulations and from devising any additional procedures for enforcing its policy of denying tax-exempt status to racially discriminatory private schools. The Dornan Amendment, Section 615 of the Treasury, Postal Service, and General Government Appropriations Act of 1980 ("1980 Appropriations Act"), Pub. L. No. 96-74, 93 Stat. 559, 577, prohibited use of funds made available by the Act to carry out the 1978 and 1979 proposed revenue procedures. The Ashbrook Amendment, Section 103 of the 1980 Appropriations Act, 93 Stat. 562, specified that the funds appropriated could not be used "to formulate or carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

The House Report on the 1980 Appropriations Act summarizes the Committee's misgivings concerning the proposed 1978 and 1979 revenue procedures:

> This Committee * * * is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. *The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal Revenue Service revenue procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of schools is a matter of far-reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit.* The Appropriations Committee is *unsure* that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.

H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 14-15 (1979) (emphasis supplied). Thus, the Report eschews any definitive conclusion with regard to the Service's authority, stating that the Committee is "unsure" whether the 1978 and 1979 procedures accord with legislative intent. The Report also counsels that action be taken by the Service in the area of tax exemptions for private schools "only when the legislative intent is fairly explicit." 25/

25/ That the Ashbrook and Dornan Amendments suspended only those revenue procedures promulgated after August 1978 in no way indicates congressional approval of the Service's pre-August 1978 policies.

Moreover, the sponsors of the amendments in both the House and Senate indicated their belief that the Service lacks statutory authority to deny tax exemptions to racially discriminatory schools 26/ and that the appropriations limitations were necessary to allow Congress time to act in the area. 27/

26/ Congressman Ashbrook, in discussing his amendment on the House floor, stated:

> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt status.
>
> * * * * *
>
> For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an Administration is to confuse its own role as tax collector with that of legislator, jurist, or policy-maker. [125 Cong. Rec. H5879-H5880 (daily ed. June 25 - July 13, 1979)].

Senator Helms, sponsor of the Ashbrook Amendment in the Senate, was even more explicit, stating:

> Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purpose as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet their requirements of one of the other listed purposes. [125 Cong. Rec. S11835 (daily ed. Sept. 5, 1970)].
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> See also 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (remarks of Congressman Dornan).

27/ In introducing the Ashbrook Amendment in the Senate, Senator Helms stated: "My amendment is necessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem." 125 Cong. Rec. S11980 (daily ed. Sept. 6, 1979); see 125 Cong. Rec. H5980 (daily ed. July 16, 1979) (remarks of Congressman Dornan).

In passing the Ashbrook and Dornan Amendments, Congress called a halt to the Service's effort to establish stricter and more detailed procedures for implementing its 1970 policy of denying tax-exempt status to schools which discriminate on the basis of race. 28/ The debates on these amendments, however, provide little assistance in devining Congress' view concerning the proper interpretation of Section 501(c)(3). Some legislators, including the Amendments' sponsors, expressed the view that the Service lacks statutory authority to deny tax exemptions to educational organizations such as petitioners, while others expressed the opposite view. 29/

Even if a clear congressional consensus regarding the proper interpretation of Section 501(c)(3) emerged from a reading of the debates on the Ashbrook and Dornan Amendments, little insight into the legislative intent of Section 501(c)(3) would be gained. It is well settled that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958); *United States* v. *Price*, 361 U.S. 304, 313 (1960); *Haynes* v. *United States*, 390 U.S.

28/ The Ashbrook and Dornan Amendments have been extended in subsequent fiscal years. In the Appropriations Act for fiscal 1982 the Ashbrook Amendment was extended with the addition of language which prohibits use of appropriations to carry out any court order which would cause the loss of tax-exempt status unless in effect prior to August 22, 1978. 127 Cong. Rec. H5392, H5395 (daily ed. July 30, 1981).

29/ Compare 125 Cong. Rec. H5981 (daily ed. July 16, 1979) (Congressman Philip M. Crane); *id.* at H5982 (daily ed. July 16, 1979) Congressman Goldwater); *id.* at H5884 (daily ed. July 13, 1979) (Congressman Grassley); *id.* H5885 (daily ed. July 13, 1979) (Congressman Duncan); *id.* at S11837 (daily ed. Sept. 5, 1979) (Senator Thurmond); *id.* at S11852 (daily ed. Sept. 5, 1979) (Senator Stennis) *with* *id.* at H5982 (daily ed. July 16, 1979) (Congressman Miller); *id.* at S11984 (daily ed. Sept. 6, 1979) (Congressman Schmitt); *id.* at S11833 (daily ed. Sept. 5, 1979) (Senator Javits); *id.* at S11835 (daily ed. Sept. 5, 1979) (Senator Metzenbaum); *id.* at S11851 (daily ed. Sept. 5, 1979) (Senator Levin).

85, 87 n.4. (1968); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968). This point was underscored in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). There, the Court rejected a statutory construction based on "subsequent legislative history," noting that the

> post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. * * * Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act.' [Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), quoting National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 639 n.34 (1967).]

Accord, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979), quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 n.7 (1977); see also Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980).

b. Nor do the instant cases come within the familiar rule of statutory construction that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-381 (1969). In Red Lion, this Court rejected a radio broadcaster's contention that the FCC's "fairness doctrine," which requires that public issues be broadcast and that opposing viewpoints on those issues be given fair coverage, was without statutory authorization in the Communications Act. Although the FCC had been applying the fairness doctrine since 1929 under dubious statutory authority, the Act was amended in 1959 to "make[] it very plain that * * * the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues." Id. at 380. Thus, through subsequent "positive legislation" (id. at 382), Congress "ratified" (id. at 381) the FCC's longstanding administrative construction of the Act.

Here, Congress has enacted no such subsequent legislation. The pertinent language of Section 501(c)(3) has not been altered, amended, or in any respect modified since it was enacted in 1954. In 1976, Congress enacted Section 501(i) of the 1954 Code, which denies tax-exempt status to Section 501(c)(7) organizations -- private social clubs and similar organizations -- whose charter or other written policy statements provide for "discrimination against any person on the basis of race, color, or religion." 26 U.S.C. 501(i). The 1976 statute is by its terms confined to Section 501(c)(7) organizations and, therefore, provides no guidance as to the meaning of the terms "charitable," "educational," and "religious" in Section 501(c)(3). Indeed, the only mention of Section 501(c)(3) organizations in any part of the 1976 statute or its legislative history is contained in a single footnote to the accompanying committee reports of both Houses. 30/ This single footnote reference to Section 501(c)(3) in no way indicates approval of or acquiesence in the Service's 1970 policy, but merely acknowledges the

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30/ Worded identically in both Reports, the pertinent portion of the footnote provides:

> Also, the Supreme Court has affirmed (Coit v. Green, 404 U.S. 997 (1971)) a decision (Green v. Connally, 330 F. Supp. 1150 (D.C., D.C. 1971)) that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2)). [S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7-8 & n.5 (1976); H. R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).]

In floor debate on Section 501(i), there was no indication of congressional approval of the Service's policy regarding racially discriminatory private schools. Congressmen Ullman and Frenzel, who spoke in support of the bill, explained the nondiscrimination provision regarding private social clubs as "a new requirement" and a "major change in the tax law * * * with regard to social organizations." 122 Cong. Rec. 27452 (1976).

district court's decision in Green v. Connally, supra, and this Court's summary affirmance thereof. 31/

Similarly, neither the Ashbrook Amendment nor the Dornan Amendment purport to alter, amend, or otherwise affect the definition of any statutory term in Section 501(c)(3). The amendments are negative in effect, refusing to fund certain proposed revenue procedures. Moreover, in acting on appropriations measures, legislators are entitled to assume that the funds appropriated will be used lawfully without foreclosing a later finding -- congressional or judicial -- that the agency funded has in fact been acting unlawfully. As this Court noted in TVA v. Hill, 437 U.S. 153, 190-191 (1978), "[w]ithout such an assurance, every appropriations measure would be pregnant with prospects of altering substantive

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31/ Even if this singular footnote reference to Section 501(c)(3) organizations had clearly expressed approval of Green, it could not be read as an authoritative expression of congressional will. In Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980), this Court cautioned that "[a] mere statement in a conference report * * * as to what the Committee believes an earlier statute meant is obviously less weighty" than subsequent legislation interpreting an earlier statute. "Thus, * * * subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment." Ibid.

The Court in GTE Sylvania, accordingly, gave no weight to statements contained in a conference committee report because the legislation which was the subject of the report did not deal with the issue discussed in the statements in question, because the interpretation espoused by the conferees was not mentioned by the committee that drafted the amending act, and because the interpretation espoused in the report was not debated on the floor of Congress. Similarly, here, the 1976 enactment of Solicitor General did not purport to interpret Section 501(c)(3) and, indeed, concerned Section 501(c)(7) organizations only. The Senate and House Reports use virtually identical language, which suggests the absence of independent consideration of the proper scope of Section 501(c)(3), and the footnote reference to Green (again, assuming arguendo that it expressed approval of Green) was not debated on the floor of Congress. Thus the conclusion of the Court in GTE Sylvania applies equally here: "the statement of the Conference Committee is far from authoritative as an expression of congressional will * * *." 447 U.S. at 120.

legislation." Accordingly, the Ashbrook and Dornan Amendments afford no basis for ascribing to Congress an intent contrary to that reflected in the plain language and legislative history of Section 501(c)(3).

A similar question of statutory construction was involved in SEC v. Sloan, 436 U.S. 103 (1978), which involved a reenactment in 1964 of Section 12(k) of the Securities Exchange Act of 1934, 15 U.S.C. 78 l(k). 32/ In the Senate committee report accompanying the 1964 legislation, the Commission's interpretation of Section 12(k) was endorsed. 33/ This Court rejected the argument that this later expression of congressional intent should prevail over the plain, and contrary, meaning of the statute, declaring (436 U.S. at 121):

> Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of re-enactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12(k). On this point the present case differs significantly from United States v. Correll, [389 U.S. 299, 304 (1967)] where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that "to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position * * *."

Like the statute at issue in Sloan, the meaning of Section 501(c)(3) is clear from its language. Indeed, the instant cases present much less compelling reasons than those in Sloan to

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32/ Section 12(k) permits the SEC "summarily to suspend trading in any security * * * for a period not exceeding ten days" under certain specified circumstances.

33/ The Senate committee report stated:

> The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. [S. Rep. No. 379, 88th Cong., 1st Sess. 66 (1963).]

construe subsequent legislative activity as indicative of a particular statutory interpretation. As previously discussed, the congressional activity relating to the 1976 enactment of Section 501(i) and to passage of the Ashbrook and Dornan Amendments generated no committee report or other meaningful legislative expression endorsing or otherwise approving of the interpretation given Section 501(c)(3) by the district court in Green and adopted by the Service. 34/

c. There remains only the question whether, notwithstanding the foregoing discussion, the Service's practice since 1970 of denying tax-exempt status to petitioners and other racially discriminatory private schools should be regarded as authorized by Section 501(c)(3) on the ground that Congress has allowed it to continue for some eleven years. Such a proposition arguably follows from the principle of statutory construction, noted in Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 381, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."

34/ Shortly after the IRS announced its new position with regard to the tax exempt status of racially discriminatory schools, the IRS Commissioner appeared to testify before the Senate Select Committee on Equal Educational Opportunity. The Commissioner explained the Service's new policy and proposed modes of enforcement. The Chairman of the Select Committee urged him to monitor attendance records rather than to accept a private school's assurance of a nondiscriminatory admissions policy. Equal Educational Opportunity Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 91st Cong., 2d Sess. 1992-2028 (1970). This colloquy amounted to no more than a reiteration of the the Service's recent policy and an expression of approval by an individual Senator. No legislation pertaining to the tax laws was proposed or considered.

This principle has in practice been invoked by the courts with great care, since its logic would make an administrative construction unassailable in a very few years so long as Congress remains silent. In Red Lion itself, "the Congress ha[d] not just kept its silence by refusing to overturn the administrative construction, but ha[d] ratified it with positive legislation." Id. at 381-382. And in Zemel v. Rusk, 381 U.S. 1 (1965), which is relied on in Red Lion, the administrative construction in question was uninterrupted for 26 years, and the Congress had not merely "refuse[d] to overturn the administrative construction," but had reenacted the legislation without change. Id. at 12.

Subsequent cases have also emphasized that a longstanding administrative interpretation is particularly persuasive when Congress has reenacted or otherwise "revisited" the pertinent legislation without changing it. See NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-275 (1974); United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978).

Recently, however, the Court rejected the argument that the Securities Exchange Commission's interpretation of the Securities Exchange Act of 1934 should be adopted where "Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted * * * and on each occasion Congress left the administrative interpretation undisturbed." Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980). As the Court explained ibid.:

> [S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view

> that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.

Similarly, although Section 501(c)(3) has been amended since 1970, 35/ the Service's policy regarding the tax-exempt status of discriminatory private schools was not directly addressed by Congress. And, while the Green court's decision was acknowledged in congressional reports accompanying enactment of Section 501(i) in 1976, that legislation was concerned solely with the tax treatment of private social clubs. Nor was discussion of the Service's 1970 revenue ruling in connection with the Ashbrook and Dornan Amendments equivalent to a failure to alter administrative construction. As noted above, when voting on appropriations measures, legislators are entitled to operate under the assumption that the agencies funded are operating within the law. See TVA v. Hill, 437 U.S. 153, 190 (1978).

Thus, as in Aaron, the failure of Congress to act on the Service's 1970 revenue rulings falls far short of supporting a construction of Section 501(c)(3) "so clearly at odds with its plain meaning and legislative history." This point bears emphasis, for even where the agency's statutory construction has been consistent and longstanding, and even where Congress, having been informed of the agency's construction, has reenacted the statute without overturning that construction, the courts will reject an agency interpretation unsupported by the language of the statute and its legislative history. SEC v. Sloan, supra, 436 U.S. at 119-120, 122-123.

35/ In 1976 Congress amended Section 501(c)(3) to confer tax-exempt status upon organizations devoted to fostering national or international sports competition. See Pub. L. No. 94-455, Section 1313(a), 90 Stat. 1730.

Indeed, Sloan involved an agency construction which had stood consistently for 34 years, during which time the statute had been reenacted with a legislative history indicating approval of the agency construction. Id. at 117. In contrast, the Service's construction of Section 501(c)(3) regarding discriminatory schools has stood for only 11 years and represents a litigationinspired reversal of the agency interpretation given the statute for more than a half century preceding 1970. Moreover, here there has been neither statutory reenactment nor a process of amendment which focused attention on the Service's construction without changing it. In these circumstances, congressional silence cannot override the intent reflected in plain statutory language. 36/

36/ This conclusion is in no way altered by the fact that several bills have been introduced in Congress, seeking in a variety of ways to legislate with regard to the tax-exempt status of private schools. None of the bills reached the floor of either House of Congress. More importantly, the courts have accorded this type of evidence of congressional inaction virtually no weight in the effort to illuminate the intent of an earlier Congress. See United States v. Wise, 370 U.S. 405, 411 (1962); Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965).

This Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), does not suggest otherwise. That case construed 42 U.S.C. § 1981 to apply to private acts of racial discrimination, and based that interpretation on an earlier Court decision, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Subsequent to the Jones decision, Congress considered and rejected an amendment to the Equal Employment Opportunity Act of 1970 which would have repealed the interpretation accorded the statute in Jones insofar as it gave private sector employees a right of action based on racial discrimination in employment. In light of this "indication of congressional agreement with the view that § 1981 does reach private acts of racial discrimination" (id. at 175 (emphasis in original)), the Court found "no basis for deviating from the well-settled principles of stare decisis applicable to this Court's construction of federal statutes." Id. (emphasis supplied). Here, however, the doctrine of stare decisis is inapplicable, for "[t]he question of whether a segregative private school qualifies under § 501(c)(3) has not received plenary review in this Court * * *." Bob Jones University v. Simon, supra, 416 U.S. at 740 n.11.

Moreover, the extent to which the Runyon Court relied upon this congressional inaction in deciding the case is

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5. There are two final points to be made. In affirming the Service's authority to deny tax-exempt status to petitioners, the court of appeals hinted in Bob Jones University that its interpretation of Section 501(c)(3) was guided, at least in part, by equal protection considerations. Citing Norwood v. Harrison, 413 U.S. 455 (1973), the court stated (Pet. App. All n.7: "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. * * * [G]overnment must 'steer clear' of affording significant tax support to educational institutions that practice racial discrimination."

To the extent that the court of appeals was suggesting that the granting of a tax exemption to these schools would be constitutionally impermissible under the Fifth Amendment, we strongly disagree. A facially neutral statute affronts equal protection norms protecting against racial discrimination only if its enactment or operation can be said to have been animated by a discriminatory purpose. E.g., Washington v. Davis, 426 U.S. 229, 239-244 (1976); Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). 37/ Such is plainly not the case with

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36/ (cont'd)
unclear. Presumably the Court did not give that factor much weight since "unsuccessful attempts at legislation are not the best of guides to legislative intent." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 n.11 (1969); see also United States v. Wise, 370 U.S. at 411; Waterman Steamship Corp. v. United States, 381 U.S. at 269. In any event, Runyon is distinguishable from the situation with regard to Section 501(c)(3) because no legislation which would have disapproved of or overruled the interpretation given to Section 501(c)(3) by the Green court and by the Service in 1970 has ever been considered on the floor of either House of Congress.

37/ Norwood v. Harrison, supra, is not to the contrary, having arisen in the context of state and municipal programs in Mississippi that "benefitted private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems." Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978). See also Gilmore v. Montgomery, 417 U.S. 556, 568,
(cont'd)

regard to Section 501(c)(3). Nothing in its language or legislative history suggests a purpose to afford tax-exempt status to educational organizations in order to foster racial discrimination by private schools. 38/ Nor does the tax exemption conferred by Section 501(c)(3) make the government a partner or joint venturer in petitioner's enterprises. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-177 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Moreover, Norwood condemned material state resources provided to unconstitutionally segregated schools. The existence of a tax exemption for certain organizations is simply not the same kind of material support. Rather, it is a decision by Congress to refrain from collecting taxes from certain classes of organizations, including all bona fide educational ones. The policies of an organization do not change its basic character. Indeed, in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(1)), Congress considered the danger of the federal government's involvement in the kind of activity at issue in Norwood and forbade it from doing so. But in taking such action, Congress gave no indication that it was thereby limiting the entitlement of educational institutions to tax exemptions.

37/ (cont'd)
570-571 n.10 (1974). To the extent that the Court's decision in Norwood can be read to reject the proposition that discriminatory purpose is a necessary element of a constitutional violation, it should be noted that Norwood was decided prior to the Court's ruling in Washington v. Davis, supra, which held unequivocally to the contrary.

38/ Commentators have suggested that if tax exemptions were deemed to impose constitutional obligations on the recipient, no one would be immune, since, for example, individual taxpayers receive "subsidies" in the form of interest deductions, charitable contribution deductions, and medical expense deductions, while corporations receive a surtax exemption. Bittker and Kaufman, supra, 82 Yale L. J. at 68-74. "[T]he Internal Revenue Code is a pudding with plums for everyone." Id.

Although some have contended that Title VI itself should be interpreted to achieve this result, the language of Title VI -- which prohibits racial discrimination in any program or activity receiving "Federal financial assistance" -- and its legislative history render unpersuasive the contention that tax exemptions constitute federal financial assistance under Title VI. Congress defined "Federal financial assistance" in the statute as "assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty." 42 U.S.C. § 2000d-1. The Department of Justice's interpretative regulations are to the same effect. 28 C.F.R. 42 102(c). Nowhere in the statute is there an indication that Congress intended tax exemptions to be among the particular types of assistance enumerated. Nor is there any mention in its legislative history of the possibility that tax exemptions could be the basis for triggering federal coverage under Title VI. 39/ Moreover, the proposition that income tax exemptions constitute "Federal financial assistance" is inconsistent with the overall structure of the Civil Rights Act of 1964. 40/

39/ A list of covered federal programs prepared by the Deputy Attorney General in connection with hearings on Title VI does not include tax exemptions as triggering coverage, even though the list referred to such minor instances of federal financial assistance as payments to three counties in Minnesota from the national forest fund and payments to the National Board for Promotion of Rifle Practice. *Hearings on H.R. 7152 as amended by Subcommittee #5 before the House Committee on the Judiciary*, 88th Cong., 2d Sess., Pt. VI, 2773 (1964). See generally, Bittker and Kaufman, *supra*, 82 Yale L. J. at 83-84. "[I]f 'tax subsidies' were embraced by the statutory language [of Title VI], the legislators were unaware of that fact." *Id*. at 83.

40/ For example, Title II of the Act, relating to public accommodations, exempts from nondiscrimination requirements "an establishment located within a building * * * which is actually occupied by the proprietor of such establishment as his residence * * *." 42 U.S.C. 2000a(b)(1). However, if the proprietor claimed an investment tax credit on purchasing a new stove, and if such a tax subsidy were deemed "Federal financial assistance," the Title II exemption would be nullified. Similarly, under this conception of "Federal financial assistance" the exclusion of contracts of insurance and guaranty from coverage under Title VI would be cancelled if the contract recipient were a corporation which took advantage of the corporate surtax exemption. *Bittker v. Kaufman*, *supra*, 82 Yale L. J. at 81.

In light of the far-reaching implications of including federal tax exemptions within the meaning of "Federal financial assistance" under Title VI (see note 40, supra), and in the absence of any indication in the statute's language or legislative history indicating that Congress considered tax exemptions to constitute federal financial assistance, such a construction of Title VI does not withstand scrutiny. 41/

II. SHOULD THE COURT DISAGREE WITH OUR VIEW THAT THE COMMISSIONER LACKED AUTHORITY TO DENY EXEMPTIONS TO PETITIONERS ON NATIONAL POLICY GROUNDS, THE EXERCISE OF SUCH AUTHORITY HERE DID NOT VIOLATE PETITIONERS' RIGHT TO FREE RELIGIOUS BELIEF AND EXERCISE UNDER THE FIRST AMENDMENT

If the Court agrees with the preceding argument, it need not reach petitioners' claims under the First Amendment. Assuming arguendo that the Court finds the Commissioner is in fact clothed with the requisite authority to withdraw petitioners' exemptions, its action was not prohibited by the First Amendment.

41/ The reasoning of the three-judge federal district court in McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), which equated tax exemptions with "Federal financial assistance," is unpersuasive. While conceding that neither the language, nor agency interpretations, nor legislative history of Title VI of the Civil Rights Act evidenced a congressional intent to include Section 501(c) tax exemptions within the ambit of federal financial assistance under Title VI, the district court insisted that the "plain purpose" of the statute to promote nondiscrimination should override its plain language in determining whether federal tax exemptions constituted federal financial assistance. Id. at 461. The nondiscrimination purpose of Title VI would be advanced, the district court concluded, if some tax exemptions were equated with a distribution of federal funds, property, or use of federal personnel, and were thus treated as federal financial assistance.

McGlotten contravenes the maxim that the plain language rather than the general purpose of a statute should govern its interpretation, absent contrary congressional direction. E.g., Burns v. Alcala, supra. In addition, the district court's equation of tax exemptions with the distribution of federal funds seems premised on the idea that the government is entitled to all property and earnings of private parties, and thus a failure of Congress to tax constitutes federal financial assistance. The Supreme Court rejected that concept in Walz v. Tax Commission, supra, holding that a tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organization.

Both Goldsboro Christian Schools (Br. 31-44) and Bob Jones University (Br. 23-34) contend that because their racially discriminatory practices are the outgrowth of sincere religious faith, the Religion Clauses of the First Amendment prohibit the government from denying them tax-exempt status. But, as the court of appeals correctly held (81-3 Pet. App. A13-A14; footnote omitted), "the government's rule would not prohibit [petitioners] from adhering to [their] policy. Abandonment of the policy would not prevent [petitioners] from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student * * * forced to personally violate his beliefs; no student is forced to date or marry outside of his race." Moreover, the Service's policy, applied evenhandedly to sectarian and nonsectarian schools, avoids government entanglement in matters of church doctrine, and does not involve preference of one sect or doctrine over another. Hence, the court of appeals concluded that "[t]he nondiscrimination policy also passes muster under the Establishment Clause" (id. at A14).

Since all that is at issue here is tax-exempt status, rather than a governmental prohibition of any of petitioners' practices, analysis begins with the principle that, while exemption from nondiscriminatory application of generally applicable tax laws is a constitutionally permissible accommodation of charitable organizations including churches themselves (see Walz v. Tax Commission, supra), it presumably is not constitutionally required. Once such exemptions have been granted, however, very serious First Amendment problems would be presented by any attempt to differentiate among churches or other religious organizations on the basis of their beliefs or religious practices. A grave constitutional problem would be presented, for example, if an exemption were to be denied solely because of admissions practices in a seminary or because the tenents of a faith disqualify certain classes of persons from eligibility for its clergy. Thus, in a news release issued nine days after its ruling with respect to private schools, the Service stated that "[s]electivity of students, as by a religious seminary, having no relation to racial discrimination, would not be inconsistent with the IRS statement of position" (No. 81-3 J.A. A239).

On the other hand, some religious practices (even as part of a worship service), such as human sacrifice, may constitutionally be prohibited and, a fortiori, may constitutionally serve as a basis for denial of tax-exempt status. Here, we submit that there is no constitutional impediment to basing denial of tax-exempt status on petitioners' discriminatory practices (which involve commercial dealings with the public).

1. a. It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. McCormick, 321 U.S. 573 (1944)), or use of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 366 U.S. 599, 607 (1961). But as the Court has also noted, "neutral prohibitory or regulatory laws having secular aims" may impose certain "incidental burdens" on free exercise when "the burden on First Amendment values is * * * justifiable in terms of the Government's valid aims." Gillette v. United States, 401

U.S. 437, 462 (1971); see, *e.g.*, *United States* v. *Lee*, No. 80-767 (Feb. 23, 1982); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

Thus, a person is not protected from every burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905). In determining whether a particular statute is supported by a governmental interest that outweighs a free exercise claim, it is appropriate (*McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring in the judgment)):

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise Clause of the First Amendment"); *Johnson* v. *Robison*, *supra*; *Gillette* v. *United States*, *supra*. However, "[t]o strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on

religious practices or beliefs. Follett v. McCormick, supra, 321 U.S. at 577-578; Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); see United States v. Lee, supra, Slip Op. at 6-7; Braunfeld v. Brown, supra, 366 U.S. at 606. 42/

Here, despite petitioners' claims to the contrary (81-1 Br. 36; 81-3 Br. 9), the Service's rulings do not place more than an indirect and limited burden upon any person's or any corporation's right to free religious belief or exercise. Petitioners do not seek on religious grounds to limit their student body to members of a particular sect or to those who espouse particular beliefs. Rather, the focus of the policies of petitioners' at issue here is on racially discriminatory practices, not on beliefs. In requiring that petitioners maintain racially nondiscriminatory policies as a prerequisite to tax-exempt status, the Service does not purport to interfere with their right to espouse or teach a doctrine against interracial marriage, or with any student's right to adhere to such a doctrine. See Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321-322 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978). 43/ Indeed, as this Court has noted (Runyon v. McCrary, supra, 427 U.S. at 176), even if the right of parents to have their children educated in schools fostering a belief in racial discrimination is assumed to be protected by the

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42/ We submit, for example, that the First Amendment would not immunize a church from the tax on unrelated business income (see Sections 511-513 of the 1954 Code) if the church believed that it was its religious duty to conduct a business in competition with a particular company. See particularly Sections 512(b)(14) and 7605(c) of the 1954 Code.

43/ Nor do the Service's actions implicate the interests of a church in maintaining the intimacy of its activities, as petitioner Bob Jones University urges (81-3 Br. 23-25). Petitioners offer to the public on a commercial basis educational services that compete with programs of instruction in other schools and colleges (Pet. App. A3; J.A. A88-A89). Hence, "'There actual and potential constituency * * * is more public than private.'" Runyon v. McCrary, 427 U.S. 160, 172, n.10 (1976) (quoting 515 F.2d 1082, 1089).

First Amendment, the First Amendment does not protect a school's practice of racial discrimination. See also Bob Jones University v. Johnson, 396 F. Supp. 597, 606-608 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

b. Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, supra, upon which petitioners rely (81-1 Br. 33-34, 81-3 Br. 23 et seq.), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome than here. In Sherbert, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in Sherbert was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707 (1981), in which the petitioner terminated his employment when he was assigned to armament production. Petitioners face no similar choice here.

Similarly, in Yoder, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in Yoder thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although petitioners claim that their discriminatory practices are the product of religious belief, they are free to continue to maintain their racial restrictions and relinquish their claim to tax exemption and deductible charitable contributions. Alternately, petitioners can eliminate their racially restrictive admissions policies and other rules but continue to teach their religious belief in the separation of races. Unlike Sherbert and Yoder, the Service's policy therefore does not threaten the integrity of petitioners' religious beliefs or observances. See also McDaniel v. Paty, supra; Torcaso v. Watkins, 367 U.S. 488 (1961).

2. Finally, the court of appeals correctly held (81-3 Pet. App. A15-A16) that the Service's policy did not transgress Establishment Clause values because it avoids excessive entanglement with religion by applying its policy to all religiously operated schools (as well as nonreligious schools). Thus, contrary to petitioner Bob Jones University's contention (Br. 32), the Service's policy does not have "the effect of creating a religious preference" and "official hostility toward non-preferred religions."

In enforcing its ruling, the only inquiry that the Service uniformly undertakes is the relatively narrow inquiry whether the school maintains racially nondiscriminatory policies. Such an inquiry does not involve the government in preferring one religion over another, or even concerning itself with whether racial discrimination is motivated by religious belief. All private schools must demonstrate compliance with the nondiscrimination principle. Hence, the Service's policy does not violate the Establishment Clause. As the court of appeals pointed out (81-3 Pet. App. A15-A16), "the principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." See Gillette v. United States, 401 U.S. 437, 454-458 (1971). "And, the uniform application of the rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (81-3 Pet. App. A16; emphasis in original). Cf. Brown v. Dade Christian Schools, Inc., supra, 556 F.2d at 323-324 (Goldberg, J., concurring); Fiedler v. Marumsco Christian School, supra, 631 F.2d 1144; Bob Jones University v. Johnson, supra, 396 F. Supp. at 606.

Accordingly, the minimum intrusion occasioned by the Commissioner's nondiscrimination policy does not violate the Establishment Clause.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE [*]
Acting Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHAS. JUSTIN COOPER
Special Assistant to the
Assistant Attorney General

Department of Justice
Washington, D. C. 20530
(202) 633-2217

FEBRUARY 1982

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[*] The Solicitor General is disqualified in these cases.

APPENDIX II

The following material was assembled by staff in a briefing book prior to the hearing.

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TAB A

Office of the Deputy Attorney General

Washington, D.C. 20530

December 7, 1981

MEMORANDUM FOR: Edward C. Schmults
Deputy Attorney General

BEF

FROM: Bruce E. Fein
Associate Deputy Attorney General

SUBJECT: Meeting on Justice Department Briefs in Bob Jones University v. United States and Goldsboro Christian Schools v. United States

(Tuesday, December 8, 11:00 A.M. with Messrs Larry Wallace, Ken Starr, and John Murray; Rex Lee is recused from the case)

The purpose of this meeting is to alert you to the legal doctrines that the Tax Division and the Solicitor General currently intend to champion in the above-captioned Supreme Court litigation to determine whether they may be inconsistent with the litigating policies recently elucidated by the Attorney General and yourself. If you believe that there is a discrepancy, you may find it expedient to suggest a legal approach different from the one currently endorsed by the Tax Division.

The controlling issue in Bob Jones and Goldsboro is whether Congress intended §170 of the Internal Revenue Code to exclude private schools from eligibility for tax exempt status if they practice racial discrimination. An affirmative answer was given by a three judge district court in 1970 and the U. S. Supreme Court summarily affirmed. The Supreme Court has explained that summary affirmances have little doctrinal value.

Briefly stated, the legal rationale advocated by the Tax Division to justify denial of tax exempt status to private schools practicing racial discrimination is as follows:

1. Congress intended in enacting §170 some sixty years ago tacitly to bestow on federal courts authority to deny organizations that fell within the ambit of §170 tax exempt status if, after surveying contemporary national social, economic, and other policies, the courts determined that the applicant organization engaged in a practice in conflict with any such policy.

2. Although §170 was passed when both public and private racial discrimination was the norm, national policies have evolved since that time to make racial discrimination anathama to federal law. Congress, it is contended, intended to invest the federal judiciary with responsibility for detecting such a change in national policy and to alter pro tanto, the ambit of §170 in accord with contemporary national mores.

3. The Tax Division claims that the federal judiciary in these cases properly exercised a roving commission to examine all potentially eligible tax exempt schools to determine whether any should be ousted from §170 because practicing a policy that the judiciary found at odds with an overriding national policy. This expansionist view of §170, if accepted, would reflect an unprecedented entrustment of policymaking power from Congress to the judiciary.

In support of the Tax Division's views, it should be noted that they were initially endorsed under the Nixon Administration, that they are incorporated in outstanding regulations of the Internal Revenue Service, and that the incumbent Commissioner of Internal Revenue has not expressly voiced any objection to maintaining those regulations. Furthermore, to alter the government's position in Bob Jones and Goldsboro would be viewed by some as a retreat from the Department's commitment to protect civil rights.

On the other hand, the legal theory advanced by the Tax Division seems to conflict with the Attorney General's view that the Department should discourage rather than encourage judicial activism and policymaking, except when clearly mandated by statute or the Constitution. The Attorney General has stated, as you know, that the Department would not deviate from its litigating policies simply to obtain an advantage in a particular case. There is a convincing argument against interpreting §170 to exclude private schools practicing racial discrimination:

1. The statute was enacted during an era rampant with racial discrimination. It seems unlikely that the enacting Congress intended to endow courts with authority to strip schools of tax exempt status upon a finding that racial discrimination was no longer nationally acceptable. Congress, as you know, traditionally has been most reluctant to divest itself of authority over policies of taxation.

2. No substantial constitutional question would be raised by permitting private schools practicing racial discrimination to claim the exemption offered by §170. The Supreme Court has ruled that granting tax exempt status to churches or church property does not violate the First Amendment, and that offering institutions liquor licenses or similar benefits that do not actively encourage private race discrimination is constitutionally acceptable. There is thus no need in these cases to strain the interpretation of §170 to avoid a constitutional encounter.

3. The consequences of accepting the Tax Division's legal theory are daunting. It would support judicial decisions denying tax exempt status to institutions that did not accommodate the handicapped, the aged, women, and other groups currently favored in federal statutes on the ground that a tax exemption would be inconsistent with national policy. This exercise of judicial power would represent a sharp deviation from traditional congressional resistence to regulating comprehensively the affairs of nonprofit and other small entities.

The briefs in the Supreme Court are scheduled for filing in approximately one week, although it might be possible to obtain an extension. If you believe at the conclusion of the meeting that there is any merit to altering the Department's litigating position, then further consultation with the Attorney General and our client agency in the matter, the Internal Revenue Service, would be necessary.

TAB B

SPECIAL ASSISTANT TO
THE ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

12/8/81

Ken -

Re Bob Jones Univ.

I just ran across the attached relevant statements in the Republican platform and Reagan/Bush position papers. I have sent copies to Bruce.

Carolyn

1980 Republican Platform

America's children, with a special commitment to those who must overcome handicap, deprivation, or discrimination. That is why we condemn the forced busing of school children to achieve arbitrary racial quotas. Busing has been a prescription for disaster, blighting whole communities across the land with its divisive impact. It has failed to improve the quality of education, while diverting funds from programs that could make the difference between success and failure for the poor, the disabled, and minority children.

We must halt forced busing and get on with the education of all our children, focusing on the real causes of their problems, especially lack of economic opportunity.

Federal education policy must be based on the primacy of parental rights and responsibility. Toward that end, we reaffirm our support for a system of educational assistance based on tax credits that will in part compensate parents for their financial sacrifices in paying tuition at the elementary, secondary, and post-secondary level. This is a matter of fairness, especially for low-income families, most of whom would be free for the first time to choose for their children those schools which best correspond to their own cultural and moral values. In this way, the schools will be strengthened by the families' involvement, and the families' strengths will be reinforced by supportive cultural institutions.

We are dismayed that the Carter Administration cruelly reneged on promises made during the 1976 campaign. Wielding the threat of his veto, Mr. Carter led the fight against Republican attempts to make tuition tax credits a reality.

Next year, a Republican White House will assist, not sabotage, Congressional efforts to enact tuition tax relief into law.

We will halt the unconstitutional regulatory vendetta launched by Mr. Carter's IRS Commissioner against independent schools.

We will hold the federal bureaucracy accountable for its harassment of colleges and universities and will clear away the tangle of regulation that has unconscionably driven up their expenses and tuitions. We will respect the rights of state and local authorities in the management of their school systems.

The commitment of the American people to provide educational opportunities for all has resulted in a tremendous expansion of schools at all levels. And the more we reduce the federal proportion of taxation, the more resources will be left to sustain and develop state and local institutions.

Health

Our country's unequalled system of medical care, bringing greater benefits to more people than anywhere else on earth, is a splendid example of how Americans have taken care of their own needs with private institutions.

Significant as these achievements are, we must not be complacent. Health care costs continue to rise, farther and faster than they should, and threaten to spiral beyond the reach of many families. The causes are the Democratic Congress' inflationary spending and excessive and expensive regulations.

Republicans unequivocally oppose socialized medicine, in whatever guise it is presented by the Democratic Party. We reject the creation of a national health service and all proposals for compulsory national health insurance.

Our country has made spectacular gains in health care in recent decades. Most families are now covered by private insurance, Medicare, or in the case of the poor, the entirely free services under Medicaid.

Republicans recognize that many health care problems can be solved if government will work closely with the private sector to find remedies that will enhance our current system of excellent care. We applaud, as an example, the voluntary effort which has been undertaken by our nation's hospitals to control costs. The results have been encouraging. More remains to be done.

What ails American medicine is government meddling and the strait-jacket of federal programs. The prescription for good health care is deregulation and an emphasis upon consumer rights and patient choice.

As consumers of health care, individual Americans and their families should be able to make their own choices about health care protection. We propose to assist them in so doing through tax and financial incentives. These could enable them to choose their own health coverage, including protection from the catastrophic costs of major long-term illness, without compulsory regimentation.

Americans should be protected against financial disaster brought on by medical expenses. We recognize both the need to provide assistance in many cases and the responsibility of citizens to provide for their own needs. By using tax incentives and reforming federal medical assistance programs, government and the private sector can jointly develop compassionate and innovative means to provide financial relief when it is most needed.

We endorse alternatives to institutional care. Not only is it costly but it also separates individuals from the supportive environment of family and friends. This is especially important for the elderly and those requiring long-term care. We advocate the reform of Medicare to encourage home-based care whenever feasible. In addition, we encourage the development of innovative alternate health care delivery systems and other out-patient services at the local level.

We must maintain our commitment to the aged and to the poor by providing quality care through Medicare and Medicaid. These programs need the careful, detailed reevaluation they have never received from the Democrats, who have characteristically neglected their financial stability. We believe that the needs of those who depend upon these programs, particularly the elderly, can be better served, especially when a Republican Administration cracks down on fraud and abuse so that program monies can be directed toward those truly in need. In the case of Medicaid, we will aid the states in restoring its financial integrity and its local direction.

We welcome the long-overdue emphasis on preventive health care and physical fitness that is making Americans more aware than ever of their personal responsibility for good health. Today's enthusiasm and emphasis on staying well holds the promise of dramatically improved health and well-being in the decades ahead. Additionally, health professionals, as well as individuals, have long recognized that preventing illness or injury is much less expensive than treating it. Therefore, preventive medicine combined with good personal health habits and health education, can make a major impact on the cost of health care. Employers and employees, unions and business associations, families, schools, and neighborhood groups all have important parts in what is becoming a national crusade for better living.

Youth

The Republican Party recognizes that young people want the opportunity to exercise the rights and responsibilities of adults.

The Republican agenda for making educational and employment opportunities available to our youth has been addressed in detail in other sections of this platform.

Republicans are committed to the enactment of a youth differential in the minimum wage and other vitally needed incentives for the creation of jobs for our young.

In addition, we reaffirm our commitment to broaden the involvement of young people in all phases of the political process—as voters, party workers and leaders, dates and elected officials, and particip in government at all levels.

We pledge, as we have elsewhere in th platform, efforts to create an environmen which will enable our nation's youth:

To live in a society which is safe and free;

To pursue personal, education, and vocational goals to the utmost of their abilities;

To experience the support, encouragement, and strength that comes from maintenance of the family and its values; and

To know the stimulus of challenge, renewal through encouragement, provision of opportunities, and the growth that comes from responsible participation in numerous aspects of our society.

OLDER AMERICANS

Inflation is called "the cruelest tax." It strikes most cruelly at the elderly, especially those on fixed incomes. It strikes viciously at the sick and the infirm, and those who are alone in the world.

Inflation has robbed our elderly of dignity and security. An entire generation of responsible and productive citizens who toiled and saved a full working life to build up a retirement nest egg now finds that it cannot survive on its savings. Today's inflation rates dwarf yesterday's interest rates, and the pensions and annuities of our elderly citizens cannot keep up with the rising cost of living. Millions of once-proud and independent elderly Americans face a future of welfare dependency and despair.

We propose to assist families, and individuals of all ages, to meet the needs of the elderly, primarily through vigorous private initiative. Only a comprehensive reduction in tax rates will enable families to save for retirement income, and to protect that income from ravaging inflation. Only new tax exemptions and incentives can make it possible for many families to afford to care for their older members at home.

Present laws can create obstacles to older Americans' remaining in the family home. Federal programs for the elderly, such as Medicare and Supplemental Security income, must address, humanely and generously, the special circumstances of those who choose to stay with their families rather than enter a nursing home or other institution.

Social Security is one of this nation's most vital commitments to our senior citizens. We commit the Republican Party to first save, and then strengthen, this fundamental contract between our government and its productive citizens.

Republicans consider older Americans a community asset, not a national problem. We are committed to using the sadly wasted talents of the aged throughout our society, which sorely needs their experience and wisdom. To that end, and as a matter of basic fairness, we proudly reaffirm our opposition to mandatory retirement and our long-standing Republican commitment to end the Democrats' limitation on earnings for elderly Social Security recipients. In addition, the Republican Party is strongly opposed to the taxation of Social Security benefits and we pledge to oppose any attempts to tax these benefits.

Republicans have resisted Democratic electioneering schemes to spend away the Social Security trust funds for political purposes. Now the bill has come due, and the workers of America are staggering under their new tax burdens. This must stop.

Precisely because Social Security is a precious lifeline for millions of the elderly, orphaned, and disabled, we insist that its financing be sound and stable. We will preserve Social Security for its original purpose.

The problems of Social Security financing are only an aspect of the overriding problems of the economy which Democratic mismanagement has produced. There is but one answer, the comprehensive tax rate reduc-

TAB C

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

DEC 15 1981

Honorable Trent Lott
U. S. House of Representatives
Washington, D. C. 20515

Dear Congressman Lott:

The Attorney General and the Solicitor General have requested me to answer your letters of October 30th concerning the cases of *Goldsboro Christian Schools, Inc.* v. *United States*, No. 81-1, and *Bob Jones University* v. *United States*, No. 81-3, now pending in the Supreme Court. As you have noted, the Solicitor General is disqualified in these cases.

When the status of private schools with reference to Sections 170 and 501(c)(3) of the Internal Revenue Code came into question around 1970, Commissioner of Internal Revenue, Randolph Thrower, after extensive study of the relevant statutory and constitutional provisions, and after review at the highest levels of the Government, announced the position of the Internal Revenue Service thereafter set forth in Revenue Ruling 71-447, 1971-2 Cumulative Bulletin 230. That position has been maintained by each of Commissioner Thrower's successors, including the current incumbent. The view of the Commissioner has been defended in litigation by the Department of Justice under the several Attorneys General then and thereafter in office. It has been approved by two United States Courts of Appeals in three separate lawsuits. The Department has been unable to conclude that abandonment of the legal position in defense of the Commissioner's regulations in *Bob Jones* and *Goldsboro* would be expedient.

We believe that the cases now pending in the Supreme Court will squarely present the substantive issues involved, and we look to the decision of that Court for authoritative answers to the questions presented. We shall of course be happy to keep you informed of any developments in the cases.

Sincerely yours,

Edward C. Schmults

TAB D

81-19081

nter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 15, 1981

For: SECRETARY REGAN

From: Peter J. Wallison PJW
General Counsel

Subject: Your Meeting With Congressman Trent Lott.

Congressman Lott will probably raise three matters with you:

1. The position of the Internal Revenue Service and the Administration in Bob Jones University v. United States. In 1970, the tax exemption of Bob Jones University, a fundamentalist religious school, was revoked by the Internal Revenue Service on the ground that the school practiced racial discrimination. The revocation was contested at the district court level and overturned, but the Service's position was upheld by the United States Court of Appeals for the Fourth Circuit. At the urging of the Service as well as the school, the case is now on appeal to the Supreme Court. Congressman Lott is distressed by the fact that the Administration is arguing in support of the position of the Service and the Court of Appeals decision.

2. Green v. Regan. This is the Mississippi schools case with which you are familiar. In August 1981 -- at the direction of the Federal District Court for the District of Columbia -- the IRS revoked the tax exemption of five Mississippi schools on the ground that these schools failed to demonstrate that they did not practice racial discrimination.

3. The Ashbrook Amendment, an amendment to the recent continuing resolution which forbids the Treasury Department and the Internal Revenue Service from using appropriated funds to carry out any court order which would cause the loss of tax exempt status to private, religious or church operated schools. As you know, the Ashbrook Amendment sets up a constitutional confrontation of potentially historic significance, in that it forbids you from using appropriated funds to comply with a court order and thus presents a stark conflict between the powers

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	WALLISON	D. THOMAS			
Initials/Date	/	dg / 12/15	/	/	/

OS F 10-01.2 (6-77) which replaces OS 3275 which may be used until stock is depleted.

of Congress and the courts. On October 1, you requested an opinion of the Attorney General as to the course you should pursue in this matter, and although we have been in touch with the Justice Department regularly since that time, the Attorney General has not yet been able to make a determination.

A more complete description of each of these matters follows.

-- The Bob Jones case.

The issues in this case are simply stated but have significant ramifications. Bob Jones is an avowedly religious school with a fundamentalist philosophy which holds that mixing of the races is contrary to Scripture. The University asserts in this case that denying its tax exemption is tantamount to denying the validity of its fundamentalist beliefs and is thus an interference with the First Amendment rights of freedom of speech and religion.

The Service and the Justice Department argue that in order to be entitled to the benefits of a tax exemption an organization must be "charitable" in the broadest sense, and thus must serve and conform to the fundamental public policies of society. Since it is clearly a basic public policy of the United States to prohibit an element of discrimination based on race, any organization -- even a religious organization -- cannot be considered "charitable" if it practices racial discrimination.

This has been the position of the Service since 1970 and has many times been upheld by the courts. Congressman Lott will contend that section 501(c)(3) of the Internal Revenue Code speaks of "charitable" activities as only one of a number of activities which entitle an organization to tax exempt status (the others being, for example, religious, scientific or educational activities), and that there is no basis for asserting that a "charitable" purpose is more important than the others. He may also argue that the Ashbrook Amendment expresses a policy of Congress that the Service not deny tax exempt status to bona fide religious schools, and that this policy should overcome the public policy which opposes racial discrimination.

Congressman Lott has written to you and to Commissioner Egger concerning this matter. Commissioner Egger's draft reply is attached. In that reply, the Commissioner re-asserts the traditional position of the Service, and denies that the Ashbrook Amendment applies to the Bob Jones matter.

My own view is that you should support the Commissioner's position fully. It is one thing for government affirmatively to interfere with the rights of free speech or freedom of religion;

it is quite another for the government to grant a tax exemption which encourages activities which clearly violate the most fundamental precepts of our society. Bob Jones University may continue to pursue its religious convictions, but without tax exemption.

-- Green v. Regan.

This issue arose in June of 1981, when the Service proposed to send out letters to five Mississippi private schools revoking their tax exemptions because they had not demonstrated that they did not discriminate in their admissions policies on the basis of race. This affirmative standard to prove non-discrimination is contrary to the current position of the Service or the Administration, but was imposed by an order of the United States District Court for the District of Columbia, which held that the Service must revoke the tax exemption of any "white flight" school which was unable to establish that it did not discriminate.

Congressman Lott will express displeasure with the issuance of these letters of revocation, but he understands that the Service was acting under a court order which was put in place with the concurrence of the past Administration and with which Commissioner Egger and the current Administration are not in sympathy. Nevertheless, the five affected schools have now appealed to the Tax Court and the Service must defend its revocation actions within the next few months.

Because the Service's actions were taken pursuant to court order, Congressman Lott will not have much to complain about, but he may still assert that the Service was free to find that the five schools had demonstrated non-discrimination even though they could adduce no affirmative evidence in support of such a finding.

-- The Ashbrook Amendment.

The language of the Ashbrook Amendment purports to deny funds to the Treasury Department and the Internal Revenue Service for the purpose of formulating or carrying out "any rule, policy, procedure, regulation, standard, court order, or measure which would cause the loss of tax exempt status for private, religious or church operated schools under section 501(c)(3) of the IRC of 1954, unless in effect prior to August 22, 1978."

Congressman Lott will argue that the Ashbrook Amendment, which is now binding on the Department through its inclusion in the most recent continuing resolution, prohibits you and the Commissioner from carrying out the order in the Green case referred to above. As noted at the outset of this memo, this sets up a constitutional confrontation between Congress and the courts, in which you and the Commissioner must choose between complying with the court order to complying with a Congressional enactment.

On October 1, you asked the Attorney General for an opinion as to the course you should adopt, but the difficulty of this question is such that Justice's Office of Legal Counsel has not yet been able to formulate a response.

Congressman Lott will certainly state that the Ashbrook Amendment binds you not to comply with the court order, but you should note the sensitivity of this matter from a constitutional point of view and say that you are awaiting advice from the Attorney General.

Congressman Lott may also state that the Ashbrook Amendment is a statement by Congress that the Administration should not be supporting the revocation of the tax exemption for Bob Jones University. This is not strictly correct. The Ashbrook Amendment by its terms applies only to actions by the Internal Revenue Service (in compliance with court orders or otherwise) after August 22, 1978. The revocation of the tax exemption for Bob Jones University occurred in 1970, and the Ashbrook Amendment does not prevent the Service or the Treasury Department from taking actions with respect to determinations made prior to August 22, 1978.

Attachment

ACTION

Date: DEC 8 1981

MEMORANDUM FOR: SECRETARY REGAN

From: Commissioner of Internal Revenue

Subject: Private Schools - Correspondence From Representative Trent Lott

Attached is a letter I propose to send to Trent Lott responding to his letters to you, Solicitor General Lee and me. Representative Lott wants the Government to change its position in the *Bob Jones* case, now before the Supreme Court. In 1976, IRS revoked the tax exemption of Bob Jones University because of its racially discriminatory practices. The proposed letter declines to change position.

By way of background, in 1969 the *Green* case was filed challenging IRS action recognizing the tax exemption of racially discriminatory Mississippi private schools. In 1970, Commissioner Thrower announced that IRS would no longer recognize discriminatory schools as tax exempt. Also in 1970, the court in *Green* permanently enjoined IRS to follow this position in Mississippi. *Green* was appealed to the Supreme Court by a third party and affirmed. In 1971 and 1975, procedures and rulings were established by IRS to carry out this position. The legal basis for this position is that exempt organizations must be charitable in the broad legal sense. This legal position has been maintained by the IRS since at least the 1920's and has been expressly set forth in regulations since 1959. In 1976, IRS revoked the Bob Jones exemption because of its racially discriminatory policies.

Although Bob Jones prevailed before the District Court on its First Amendment arguments, the Fourth Circuit upheld the revocation. The only other circuit court to consider the issue has upheld the Service's nondiscrimination requirement in the context of a secular private school. The validity of the nondiscrimination rule applied by IRS since 1970 is squarely presented by *Bob Jones*. The Supreme Court should be allowed to decide the issue.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer	Ex. Sec.
Surname						
In / Date	/	/	/	/	/	/ 12

Form OS-3129
Department of Treasury

Representative Lott's letter states that maintaining the Service's position in Bob Jones violates the Ashbrook Amendment. This is not so. The Amendment prohibits Treasury and IRS from enforcing rules proposed in 1978 and 1979 that would have imposed affirmative action requirements on some schools as a condition for exemption. Bob Jones was revoked under rules existing prior to the rules proposed in 1978 and 1979. In debates on the Ashbrook Amendment, many members of Congress stated that IRS can enforce the rules in effect before 1978.

IRS has consistently maintained a nondiscriminatory requirement since 1970 and has consistently interpreted the tax law for over 60 years to require that exempt organizations be charitable in the broad legal sense. The courts have held that organizations that violate a clearly defined public policy are not charitable in the broad sense of the word. At least since the 1954 Brown decision there has been a clear federal policy against racial discrimination in education.

IRS has supported church groups in getting their arguments before the courts. If IRS is wrong in its interpretation of the law, the Supreme Court is the proper forum to have the issue decided.

I would like an opportunity to discuss this matter with you at an early date.

Attachments

Proposed response to Rep. Trent Lott

COMMISSIONER OF INTERNAL REVENUE
Washington, DC 20224

DRAFT

Honorable Trent Lott
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Lott:

I am responding to your letter about Bob Jones University v. United States and Internal Revenue Service rules to determine the tax exempt status of church related private schools. Your letter urges the Internal Revenue Service to reverse the position taken before the courts in Bob Jones.

In 1967 the Internal Revenue Service announced that it would no longer recognize as tax exempt a racially segregated private school if its involvement with the state or political subdivision would make the operation of the school unconstitutional or a violation of Federal law. In 1969, the Green case was filed by the parents of black children in Mississippi attending public schools to challenge the granting of tax exemptions to private schools in Mississippi which discriminated on the basis of race. The Internal Revenue Service in 1970 announced that it could no longer justify granting tax exemption to private schools which discriminated on the basis of race. Rules were subsequently adopted to implement this policy nationwide. In 1975 the Service published a ruling clarifying that church related schools must also be operated on a racially nondiscriminatory basis to be tax exempt. We continue to believe that all private schools, including church related schools, must be operated on a racially nondiscriminatory basis to be tax exempt.

The revocation of the tax exempt status of Bob Jones University results from the application of these principles. Prior to 1975, the University refused to admit unmarried black students. Although the University agreed to admit unmarried black students after 1975, the rules of the University, violation of which results in expulsion, place substantial restrictions on the social interaction of black and white students. Similar restrictions were invalidated by the Supreme Court for public education even prior to the 1954 Brown decision.

Some church groups argue that the rules applied by the Service infringe upon religious liberties guaranteed by the Constitution. Fundamental constitutional issues such as these should be resolved by the courts. This is why the Internal Revenue Service urged the Supreme Court to review the favorable decision in Bob Jones and why we supported intervention of Clarksdale Baptist Church in Green.

Your letter to Solicitor General Lee suggests that the Internal Revenue Service should abandon the position that organizations described in section 501(c)(3) must also be charitable in the broad legal sense to be tax exempt. This position reflects the intent of the Congress expressed from the 1894 tax laws to the present Internal Revenue Code. It has been applied over the years by the Service in a variety of contexts to deny tax exempt status or to deny charitable deductions. It has been expressly set forth in the regulations since 1959. We believe that the Service should continue to adhere to this position.

You also suggest that a failure to change position in Bob Jones will conflict with congressional intent as expressed in the Ashbrook and Dornan Amendments. I do not agree. The purpose of the Ashbrook and Dornan Amendments has been to prohibit the Internal Revenue Service from denying or revoking tax exempt status of a private school under rules similar to those proposed in 1978 and 1979. Bob Jones deals with a revocation of tax exempt status in 1976 based upon rules then in existence. Neither the language of the amendments nor the legislative history expresses any intent of the Congress to prohibit the Internal Revenue Service from enforcing the nondiscrimination rules in effect prior to August 22, 1978.

Your suggestion that a legislative solution should be sought, within the limits of the Constitution, deserves consideration. Our understanding is that one of the original purposes of the Ashbrook and Dornan Amendments was to prohibit the Service from acting for one year until appropriate legislation could be passed.

I realize that the views expressed in your letter reflect your sincere concern with the high place which freedom of religious expression occupies in our system of government. The issues involved are not capable of easy resolution. They have been squarely presented to the Supreme Court and should be decided by that body.

With kind personal regards,

Sincerely,

81-17016

TRENT LOTT
5TH DISTRICT, MISSISSIPPI

REPUBLICAN WHIP

RULES COMMITTEE

ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congress of the United States
House of Representatives
Washington, D.C. 20515

[illegible] Rayburn Building
Washington, D.C. 20515
202-225-5772

District Offices:
Gulfport, Mississippi [illegible]
[illegible]
Hattiesburg, Mississippi [illegible]
[illegible]
Laurel, Mississippi [illegible]
[illegible]

October 30, 1981

The Honorable Donald Regan
Secretary of the Treasury
United States Department of
the Treasury
Washington, D.C. 20220

Dear Mr. Secretary:

Enclosed please find copies of my correspondence with the Commissioner of Internal Revenue and the Solicitor General. As these letters indicate, I am deeply concerned about the Government's position in this litigation. It is a position which is both legally and politically indefensible. Furthermore, it disregards the Congress by ignoring the statute and Congressional intent as expressed in the Ashbrook amendment.

I would appreciate your working with the Service to reconsider its position.

With kind regards and best wishes, I am

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Sincerely yours,

Trent Lott

Trent Lott

TL/mbw

Enclosures

TRENT LOTT
5TH DISTRICT, MISSISSIPPI

REPUBLICAN WHIP

RULES COMMITTEE

ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

2400 Rayburn Building
Washington, D.C. 20515
202-225-5772

District Offices:
Gulfport, Mississippi [illegible]
[illegible]
Hattiesburg, Mississippi [illegible]
[illegible]
Laurel, Mississippi [illegible]
[illegible]

October 30, 1981

The Honorable Roscoe Egger, Jr.
Commissioner of Internal Revenue
1111 Constitution Avenue NW
Washington, D. C. 20224

Dear Mr. Commissioner:

I enclose herewith a copy of my letter of today's date to Solicitor General Rex Lee regarding the position taken by the Service before the Supreme Court in *Bob Jones University v. United States*. I am delighted that the Service has persuaded the Court to hear the case, but I am deeply disturbed that the Service is urging a resolution completely contrary to the repeated declarations of the Congress.

I understand the difficult position in which you found yourself in *Green v. Regan* when you took office. The court had ordered the Service to perform certain acts contrary to the law, and the time for appeal had expired. I appreciated your efforts in securing intervention by interested parties to assert the positions which you felt the Service was barred from adopting.

Nevertheless, I cannot understand the Service's position in this case, the outcome of which will clearly control the result in the *Green* case. No court has ordered the Service to do anything, and you are free to urge your own construction of Section 501 (c) (3) before the Court. The Service is bound neither by the courts nor by the advice of its own lawyers, but you have nevertheless chosen a position clearly contrary to Congressional intent.

I do not wish to rehearse the legal arguments laid out in my letter to General Lee. Rather, I wish to point out the practical result of a Court decision in line with the Service's wishes. Your efforts in the future to enforce your interpretation will run squarely into the bar of the Ashbrook Amendment. The House and the Senate Committee have responded to your contention that the present language does not include court orders by adding that restriction to the Amendment. The seeds of a major confrontation among all three branches of government are plainly present in the Service's position.

It may be that you feel that you are somehow bound by the existing regulations. I should point out to you that the Ashbrook Amendment in no way binds you to the existing regulations. You are perfectly free to enforce any regulations antedating August 22, 1978, including those superseded as a result of the original Green ruling. If it is necessary to use the provisions of the Administrative Procedure Act to reinstate those former regulations which do comport with Congressional intent, then please do so immediately.

If the Supreme Court accepts the reading of the law which has been applied by your immediate predecessors, then the only possible cure is through legislation. Until that happens, you are certainly not bound by the lower courts or by your predecessors. If you do not intend to act to change the present practice, then I would appreciate your explanation in detail of your own reasons so that I can prepare the proper legislative remedies.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. Donald Regan
Hon. William French Smith

TRENT LOTT
5TH DISTRICT, MISSISSIPPI

REPUBLICAN WHIP

RULES COMMITTEE

ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

2400 RAYBURN BUILDING
WASHINGTON, D.C. 20515
202-225-5772

DISTRICT OFFICES:
GULFPORT, MISSISSIPPI [illegible]
[illegible]
HATTIESBURG, MISSISSIPPI [illegible]
[illegible]
LAUREL, MISSISSIPPI [illegible]
[illegible]

October 30, 1981

The Honorable Rex Lee
Solicitor General
United States Department of Justice
Washington, D.C. 20530

Dear Mr. Solicitor General:

I am sure you are familiar with my correspondence earlier this year with the Attorney General and the Deputy Attorney General regarding the many pending cases concerning the tax exempt status of church schools. I was disappointed to learn that you will not be involved in Bob Jones University v. United States and, indeed, that no Reagan appointee will play a major role. Please pass my concerns along to whoever is handling these consolidated cases.

I am delighted that the Administration encouraged the Supreme Court to resolve these issues. However, I am more than a little disturbed that the United States has taken a position on the merits which plainly conflicts with Congressional intent and with a specific pledge of the President's platform. I strongly encourage your office to reconsider your position.

The Government's position ignores Congressional intent. Section 501(c)(3) of the Code plainly defines exempt organizations to include bodies "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." "Charitable" is merely one of those purposes, as are "religious" and "educational." Nowhere does the statute require a religious or educational organization to be "charitable" in order to qualify for a tax exemption. If the statute is read this way, then organizations must also be "scientific" and test for public safety. Since the plain language of the statute forecloses the construction urged by the Government, ordinary rules of construction preclude looking behind the language to the legislative history.

The Government does not even bother to look at the history of this particular section as it was adopted in 1938. Rather, the United States derives its construction from subsequent unrelated Congressional actions against racial discrimination. Ordinarily, committee reports and floor remarks made long after the fact are completely irrelevant in determining the intent of a previous Congress. Furthermore, these later Congressional actions were responsive to other problems and there is absolutely no indication that Congress intended these relatively recent actions to be read into an unrelated statute passed in 1938.

If subsequent actions are relevant, then the Government should focus upon expressions of Congressional intent on this very issue. The Ashbrook Amendment to successive Treasury appropriations prohibits absolutely the use of federal funds to "cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954." Congressional intent could not be clearer. Therefore, if the Government insists on defining Congressional intent by later actions, then certainly that intent is most clearly reflected by the Ashbrook amendment.

The Internal Revenue Service's action in revoking the tax exempt status of these schools is peculiarly reminiscent of the federal bureaucracy's activism and usurption of power during the previous Administration. Mississippians and many of their fellow citizens supported President Reagan simply to end this kind of unwarranted interference.

The last time I read the Constitution, it provided that the Congress is to make the laws--not appointed officials. The people across the country whose lives are directly affected are entitled to have the decision of their elected Representatives respected and followed by the Government. Congress has spoken, and its message is clear. It is up to the Government to enforce what Congress has done. I expect your office to reconsider its position and to report its decision to me.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

Trent Lott

TL/mbw

cc: Hon. Ronald Reagan
Hon. Donald Regan
Hon. Roscoe Egger, Jr.
Hon. William French Smith

TAB E

ROUTING AND TRANSMITTAL SLIP

Date 12/15/81

TO: *(Name, office symbol, room number, building, Agency/Post)*	Initials	Date
1. Chuck Wheeler		
2. John Williams		
3.		
4.		
5.		

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Attached are copies of suggested talking points for the Commissioner's meeting with Senator Thurmond, et al. The Commissioner's copy is included in this package.

Package also includesfour background items: Suggested Church Pre-Examination Questions, Correspondence Concerning Examination, Manual Provision Concerning Examination of Churches, and Church Case Writeups.

This was looked over by Milton Cerny and Mike Patton.

cc: Mr. Winborne
Mr. Tedesco

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: *(Name, org. symbol, Agency/Post)*	Room No.—Bldg.
Howard M. Schoenfeld Howard M Schoenfeld	Phone No.

5041-102

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

Talking Points
Meeting with Senator Thurmond, et al. 12/17/81

*IRS should change its litigating position on *Bob Jones University* and Coldsboro.

Now before Supreme Court ... difficult and sensitive Constitutional questions ... only way to assure resolution of issue.

*Must all section 501(c)(3) organizations be "charitable"? (i.e. broad sense).

Long standing IRS position. Issue presented by *Bob Jones* and Court should decide ... applies to all kinds of organizations claiming exemption.

*What are limits of public policy rationale? (e.g. sex discrimination)

IRS must and does follow Courts . ...Such public policy against racial discrimination in education was found in *Green*.

*What legislative option are available to Congress?

We should stay way from legislation until we know what the law is ... depending on outcome of *Bob Jones*, would be more appropriate then to fashion legislative remedies consistent, of course, with Constitution.

*What administrative options are available to IRS?

Few, if any, because of Ashbrook and Dornan Appropriations Riders.

*Will a church or association of churches be revoked because of a single isolated instance of racial discrimination that does not represent a pattern of intentional discrimination?

Service would apply usual *de minimus* standards in such a case.

*What is the current effect and status of Dornan and Ashbrook Appropriations Riders?

They are in effect and working ... IRS private school examination activity at this time is generally limited to investigating cases of complaints of racial discrimination.

*What is the current status of IRS private school efforts?

As a result of 1980 Green order, five non-church related private schools now in litigation ... petitions recently filed in Tax Court: 29 churchrelated schools held in suspense in connection with Clarksdale's intervention in Green ... Justice recently requested extend suspension until Court decides Bob Jones .... In Wright, petition filed with Supreme Court seeking certiorari.

*What are IRS church e xamination procedures?

IRS bound by IRC 7605(c) and applicable regulations as well as IR Manual instructions. These procedures generally provide that churches will not be examined except as a last resort ... Regional Commissioner approval required ... 30 day advance notice requirement ... 2 written attempts to get information a prerequisite.

*Why does IRS examine churches?

Many such audits initiated because of mail-order ministries and tax protestor problems. Although IRS compliance efforts in those areas focus on individual's tax status, it is sometimes necessary to look at church books or accounts, particularly where there are allegations of financial abuse and misconduct. Also examine to determine qualification under IRC 501(c)(3) and for IRC 511 tax liability.

*Why did IRS define integrated auxiliary in narrow fashion?

Regulations interpret IRC 6033 and Congressional intent as IRS sees it ... Congress devised "integrated auxiliary" term, leaving little guidance for IRS in day-to-day administration.

*What is role of IRS in policing church pronouncements on social and economic issues?

Role of IRS is limited to enforcing restrictions in section 501(c)(3) against carrying on of substantial legislative activities or engaging in any political activities.

TAB F

Inter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 17, 1981

For: SECRETARY REGAN

From: Peter J. Wallison PJW
General Counsel

Subject: Response to Congressman Trent Lott

I have previously furnished you with a memorandum, dated December 15, discussing the issues which Trent Lott may raise with you during a meeting or phone call this week. Further discussions of these questions within Treasury suggest that the issues in the Bob Jones case -- discussed in that memo -- are significant enough to raise at the White House level. A brief in that case must be filed with the Supreme Court by December 31 and it is the consensus among those involved in this matter at the Service and at Treasury that the issue should be considered at the White House before the brief is filed and becomes Administration policy.

I am currently preparing a full briefing memorandum for you on the subject of the Bob Jones case, preparatory to your raising the issue with Jim Baker or Ed Meese. Until we have received some guidance from the White House, it would be best to avoid any comments in conversation with Congressman Lott which commit the Administration one way or the other.

As my earlier memo indicated, the case arose out of the Service's revocation in 1970 of the tax exemption of Bob Jones University. The Service's theory -- that an organization is not entitled to tax exemption merely because it is religious in character, but that it must also be charitable in the sense that it promotes fundamental public policies -- was rejected by a federal district court but upheld by the United States Court of Appeals for the Fourth Circuit. In its brief for certiorari before the Supreme Court, the Justice Department continued to advance this argument, and certiorari was granted.

Congressman Lott will express unhappiness that this Administration is continuing to pursue this case. In response,

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	WALLISON	D. THOMAS			
Initials/Date	/	/	/	/	/

OS F 10-01.2 (6-77) which replaces OS 3275 which may be used until stock is depleted.

I suggest that you tell Congressman Lott that you and your staff are currently reviewing the question -- as you would review all IRS policies which are of major significance -- and will have a response for him before the end of the year. To the extent possible, I think you should avoid suggesting to Congressman Lott that the issue will be raised in the White House -- since we may want to preserve the President's position of non-involvement in this matter, whichever way it goes.

TAB G

FRIDAY - DECEMBER 18, 1981

8:00 a.m.	Secretary's Staff	9:10 a.m.
9:10 a.m.	Messrs. Wheeler and Williams re: Private Schools	
9:15 a.m.	Mr. Gerber	
9:30 a.m.	Sens. Thurmond, Armstrong and members of Congress re: IRS Policy toward Private Schools w/Wheeler and Williams Room 209, Russell Bldg.	11:00 a.m.
11:50 a.m.	Phone interview w/Bryan Demmy	
12:00 noon	WTA Exec. Comte. City Tavern Club	1:45 p.m.
2:30 p.m.	H&R Block Meeting - Room 1106	3:15 p.m.
4:00 p.m.	To CC Open House	

CALLS

9:20 a.m.	Mr. McNamar called
11:12 a.m.	Called Mr. McNamar - left word
11:13 a.m.	Called Mr. Chew - not in - left word
11:14 a.m.	Called George Cross
11:15 a.m.	Mr. Chew returned call - left word
11:17 a.m.	Called Peter Wallison - left word
11:20 a.m.	Returned Mr. Chew's return
11:21 a.m.	Mr. Wallison returned call - left word
11:25 a.m.	Returned Mr. Wallison's return
11:32 a.m.	Returned Albert Cohen's call
12:30 p.m.	Mr. McNamar returned call - left word
2:12 p.m.	Returned McNamar's return - left word

STROM THURMOND, S.C., CHAIRMAN
C. MATHIAS, JR., MD.
ALT, NEV.
G. HATCH, UTAH
ERT DOLE, KANS.
ALAN K. SIMPSON, WYO.
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JEREMIAH DENTON, ALA.
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HOWELL HEFLIN, ALA.

VINTON DEVANE LIDE, CHIEF COUNSEL
QUENTIN CROMMELIN, JR., STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

January 7, 1982

The Honorable Roscoe Egger, Commissioner
Internal Revenue Service (IRS Building)
1111 Constitution Avenue
Washington, D.C. 20220

Dear Commissioner Egger:

I want to take this opportunity to thank you and members of your staff for meeting with myself, Senators Armstrong and Warner, Congressman John Napier, representatives of various other Congressional offices and several attorneys interested in IRS policies affecting private, Christian schools.

I believe all of those present appreciated your understanding of the issues about which these schools are concerned, and I hope you will continue to do everything possible to resolve the various problems that were discussed.

Thank you again for your attendance at this meeting, and I look forward to working with you in the future to see that these important issues are satisfactorily addressed.

With kindest regards and best wishes,

Sincerely,

Strom Thurmond

Strom Thurmond

ST/yd

TAB H

5TH DISTRICT, MISSISSIPPI
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

WASHINGTON, D.C. 20515
202-225-5772

DISTRICT OFFICES:
GULFPORT, MISSISSIPPI [illegible]
[illegible]
HATTIESBURG, MISSISSIPPI [illegible]
[illegible]
LAUREL, MISSISSIPPI [illegible]
[illegible]

December 21, 1981

The Honorable Edward C. Schmults
Deputy Attorney General
United States Department of Justice
Washington, D. C. 20530

Dear General Schmults:

Thank you for your letter of December 15, 1981, in response to my letter of October 30, 1981. I am still concerned that the position you report may well be out of line with the President's policy.

As you may know, I also wrote the President regarding my concern over the continuing taxation of church schools. I enclose herewith a copy of the page of the President's log on which his response is recorded. While it might be argued that his response is ambiguous, it seems to me that he is clearly agreeing that the Administration should intervene on behalf of the church schools.

I believe that it is of the highest importance to resolve this apparent conflict before any brief is filed. I am sure that the regular process of reviewing litigation does not necessarily include the President, but I believe that you should do so in this case. Given the explicit promise of his platform and his apparent intention to stand by that pledge, I do not believe that any brief should be filed which undercuts his position until he has had an opportunity to review the matter.

Thank you for your careful attention to my concerns, and I look forward to your further thoughts.

With kind regards and best wishes, I am

Sincerely yours,

Trent Lott

TL/mbw

Encl.

cc: The Honorable William French Smith

RECEIVED
DEC 2[illegible] 1981
O. D. A.

PRESIDENTIAL LOG OF SELECTED HOUSE MAIL

	SUBJECT	COMMENTS
[illegible]	EXPRESSES STRONG SUPPORT FOR THE EXTENSION OF THE TARIFF ON IMPORTED FASTENERS	
D. DINGELL ALSO SIGNED BY: PHILIP R. SHARP	COMMENDS THE ADMINISTRATION FOR NOT SUPPORTING ANY FURTHER WAIVERS OF LAW FOR THE ALASKAN NATURAL GAS TRANSPORTATION SYSTEM	↙
RENT LOTT	WRITES REGARDING PENDING CASES CONCERNING THE TAX EXEMPT STATUS OF CHURCH SCHOOLS. INDICATES THAT THE SUPREME COURT HAS NOW AGREED TO REVIEW THE CASE OF "BOB JONES UNIVERSITY V. UNITED STATES," AND URGES YOU TO INTERVENE IN THIS PARTICULAR CASE	I think we should.
J. KENNETH ROBINSON LSO SIGNED BY: JOHN M. ASHBROOK ROBERT MCCLORY G. WILLIAM WHITEHURST C. W. BILL YOUNG	EXPRESS THEIR SUPPORT FOR THE PROPOSED EXECUTIVE ORDER ON INTELLIGENCE, AS WELL AS THEIR CONCERN OVER THE MISLEADING STORIES IN THE PRESS. IN PROTECTING OUR NATIONAL SECURITY INTEREST CONSISTENT WITH THE EXECUTIVE ORDER, SUGGESTS THAT CERTAIN MODIFICATIONS OF EXISTING STATUTES MAY BE REQUIRED, PARTICULARLY IN REGARD TO THE LIMITS IMPOSED BY THE FOREIGN INTELLIGENCE SURVEILLANCE ACT	I'm with them

OFFICIAL FOI COPY
TREASURY LIBRARY

81-19463 Lott, T.

DGC

TRENT LOTT
[illegible]
REPUBLICAN WHIP
RULES COMMITTEE
ADMINISTRATIVE ASSISTANT
TOM H. ANDERSON, JR.

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

December 21, 1981

The Honorable Donald T. Regan
Secretary
United States Department of the Treasury
Washington, D. C. 20220

Dear Mr. Secretary:

I am delighted to learn that you are home from the hospital. I was of course disappointed that we were unable to speak last week, but the news of your recovery is especially gratifying.

In anticipation of our forthcoming conversation on the taxation of church schools, I thought you might be interested in the enclosed copy of the page from the President's log on which he responds to my letter to him on the subject. He appears to agree with me that the Administration should be helping these schools, which, of course, is not the position presently held by your Department.

This development makes it especially important that you review this matter before the brief is filed at the Supreme Court in the next few days. The President's platform promise and his apparent intention to stand by that pledge make it imperative that this matter be carefully considered before any position is expressed in public. In fact, I would think you might wish to discuss this matter personally with the President before the brief is filed.

Thank you for your continued attention, and I look forward to speaking with you soon.

With kind regards and best wishes, I am

Sincerely yours,

Trent

Trent Lott

TL/mbw

Encl.

12/21 ??
Call now –
for Trent Lott?

TRENT LOTT	WRITES REGARDING PENDING CASES CONCERNING THE TAX EXEMPT STATUS OF CHURCH SCHOOLS. INDICATES THAT THE SUPREME COURT HAS NOW AGREED TO REVIEW THE CASE OF "BOB JONES UNIVERSITY V. UNITED STATES," AND URGES YOU TO INTERVENE IN THIS PARTICULAR CASE	I think we should.

TAB I

Subject	Date
Goldsboro Christian Schools and Bob Jones University v. U.S., Nos. 81-1 and 81-3 (S. Ct., pending)	21 DEC 1981 MRE:sew DJ 5-67-1628

To
Walter W. Barnett
Deputy Chief, Appellate Section
Civil Rights Division

From
Miriam R. Eisenstein
Attorney, Appellate Section
Civil Rights Division

The attached is Tax Division's draft brief on the merits in Goldsboro and Bob Jones, forwarded to the Solicitor General's office on Thursday, December 17, 1981. I think the draft is really excellent, and have just a few comments.

1. I have not read the petitioners' merits briefs, but based upon what they have argued all along, I would assume they are going to say, again, that they are "religious" institutions more than they are "schools," and that there is not (and probably cannot be) a national purpose to eradicate discrimination by "churches." Accordingly, our briefs in the past have always stressed the facts showing that these are accredited schools. Especially Goldsboro, which is elementary and secondary, fulfills the state's compulsory education obligation for the children who attend it. As for Bob Jones, we pointed out that the V.A. does not pay people to go to church. There's no equivalent in this draft, though there probably ought to be.

2. While I know this is an old and unresolved dispute, I still wonder if we can get away with characterizing the tax exemption as a federal benefit (pp. 35-36) and never mention (or distinguish) either Walz v. Tax Commission, 397 U.S. 664 (1970), or Norwood v. Harrison, 413 U.S. 455 (1973).

The petitioners have generally relied on Walz for the proposition that, if a tax exemption is a "benefit," it is one to which they are "absolutely" entitled. On pp. 35-36, the draft brief says that the non-discrimination tax policy serves the government's "interest" in eradicating racial discrimination. Cited are Green v. Connally and the Bob Jones V.A. case, but not Norwood v. Harrison, although it was found "dispositive" in Bob Jones v. Johnson! Now, I assume this language about "interest" is just another way of saying that it is reasonable for IRS to regard a segregated institution as non-charitable. But, query, can we really avoid the question whether it is a policy which is or might be constitutionally required? It seems stronger to admit that these cases do present a conflict between two constitutional principles: free exercise, and government abstention from support of racial discrimination. If the institutions were really "churches" the conflict might be resolved in favor of the "free exercise" of discrimination. Because they are schools, we urge the opposite resolution.

3. On p. 30, footnote, I think there is a mistake in the description of McGlotten v. Connally. That case held that segregated social clubs' tax exemption did violate the Constitution and (incorrectly) Title VI. Because the court misunderstood 501(c)(7), Congress amended the Code to conform to the decision.

cc: Mr. D'Agostino

Memorandum

760 12

Subject Goldboro Christian Schools & Bob Jones University v. U.S., Nos. 81-1 and 81-3, O.T. 1981	Date DEC 22 1981 WWB:bj DJ 5-67-1628

To Wm. Bradford Reynolds Assistant Attorney General Civil Rights Division	From WWB Walter W. Barnett Deputy Chief, Appellate Section Civil Rights Division

Attached are the Tax Division's draft brief (as sent to the SG) and a cover note from Ms. Eisenstein mentioning a few suggestions. Our merits brief as respondent is due December 31, 1981.

I propose to leave the bulk of this to Tax and the SG's Office. However, I do think it appropriate to share Ms. Eisenstein's comments informally with the SG's Office, as well as one other matter. The draft, on several occasions (e.g., pp. 13, 28), refers to the racially discriminatory practices of these private schools as violating "the constitutional values that shape national and state action * * *." Insofar as such a phrasing can be read to suggest that the constitution, of its own force, prohibits racial discrimination by these schools, it is wrong, and we should work with the SG's Office to make sure no such inference can be fairly drawn.

Please advise as soon as convenient.

cc: Mr. D'Agostino

12/21/81
[illegible]

TAB J

Noted by DTR

81-19464

Inter-Office Memorandum

☐ ACTION ☒ BRIEFING ☐ INFORMATION

Date: December 22, 1981

For: SECRETARY REGAN
Thru: R. T. McNamar R.T.M.
From: Peter J. Wallison PJW
General Counsel

Subject: Treasury Position on Bob Jones Case

In an earlier memorandum to you, I discussed in summary fashion the kinds of questions which Congressman Trent Lott would be likely to raise concerning the Bob Jones case and the related case of Green v. Regan. Further review of these issues within Treasury suggests that they are significant enough to raise at the White House level now, so that the Administration's position can be finally settled before the Justice Department's brief is filed in the Supreme Court on December 31.

The brief-filing requirement provides a good reason for raising this issue at the White House as soon as possible, and would also place us in a position to respond to Congressman Lott without substantial additional delay.

As noted in my earlier memo, the Service and the Justice Department have taken the position that a tax exempt religious school must be "charitable" in the broadest sense in order to be entitled to retain its tax exempt status. Thus, the mere fact that the school is a *bona fide* religious organization does not entitle it to a tax exemption, even though § 501(c)(3) of the Internal Revenue Code lists religious organizations as one of the categories of groups which are entitled to tax exempt status. The Service contends that in enacting Section 501(c)(3) of the Code, Congress intended to provide tax exemption only to those organizations which were "charitable" within the broad meaning of that word as used in common law. This means that the organization cannot pursue practices which are inconsistent with the most fundamental public policies of society, and in particular may not practice racial discrimination.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	WALLISON			ARNOLD	DPICKFORD
Initials/Date	/	/	/	A / 12/22	DP / 12/22

OS F 10-01.2 (6-77) which replaces OS 3275 which may be used until stock is depleted.

In its most general terms, the question here is whether any organization which is bona fide religious or educational is entitled to a tax exemption no matter what its practices.* Some people are very comfortable with the proposition; others believe that Congress could not have intended to provide the significant benefit of tax exemptions to organizations which practice racial discrimination.

In the Bob Jones case, the Service encountered an institution which, although tax exempt and bona fide religious, overtly practiced racial discrimination because of its fundamentalist reading of Scripture.

That the Service has the authority to revoke the tax exemption of organizations which practice racial discrimination has been upheld in the Bob Jones case by the United States Court of Appeals for the Fourth Circuit and, in another case, by a three-judge panel of the Federal District Court for the District of Columbia. Indeed, it does not seem unreasonable that an organization which discriminates on the basis of race is not "charitable" in the broadest sense and therefore should not be entitled to the benefits of tax exemption.

On the other hand, it must be recognized that once this principle is adopted it is difficult to find a stopping point. With a broad enough decision in Bob Jones, the Service could challenge a range of private schools for enforcing racially discriminatory policies de facto -- even though the distinctive feature of Bob Jones is that it established its discriminatory rules overtly. Moreover, a far-reaching decision of the Supreme Court could conceivably form the basis for other challenges to tax exempt organizations which are engaged in practices which arguably are not "charitable" -- e.g., churches which will not perform ceremonies in which members marry outside the faith. This, in my judgment, is the most serious objection to the principle articulated by the Service in the Bob Jones case.

However, given the current composition of the Supreme Court, I think it is possible that any endorsement of the Service's position will be based on narrow grounds. Such a decision would hold that the Service may revoke the tax exemption of a school which is not "charitable" because it practices racial discrimination, but the Court's opinion would emphasize that the Bob Jones case is unusual in that the school practiced racial discrimination openly and as a matter of policy. In the ordinary case, the Service must present some evidence of discrimination in order to prevail, and this is difficult to obtain without the unusual facts of Bob Jones.

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* It should be noted that the beliefs or ideas which are inculcated or taught at the school or other organization are not the issue; the issue is the school's practices. The tax exemption of Bob Jones University was revoked not because it teaches that Scripture requires separation of the races but because it implements that belief by discriminating on the basis of race.

Thus, even if the Service wins Bob Jones, the case is unlikely to lead to substantial litigation over the revocation of tax exemptions unless the organizations involved practice racial discrimination as a matter of policy. If Bob Jones is viewed in this way, it will still provide a useful Supreme Court determination as to whether schools which discriminate on racial grounds are entitled to tax exemption, but will not provide a rationale for aggressive IRS action against tax exempt organizations on other theories or on other fact patterns.

At the same time, one must consider the politics of a change in the Administration's policy with respect to Bob Jones at this point. The case was commenced during a Republican Administration in 1970 and carried through a successful appeal to the Fourth Circuit Court of Appeals. This suggests that the Service's position is neither frivolous nor the implementation of the social policies of the IRS bureaucracy. If the Administration were now to take the position that the case should not be pursued before the Supreme Court, that view would be read as a statement by the Administration that overtly discriminatory practices are not objectionable, and as a significant retreat from the past policies in this area of both Republican and Democratic Administrations. The explanation of the Administration's position -- that the tax laws are not the proper vehicle for pursuing racial discrimination -- would be lost in the ensuing outcry.

To summarize, then, the Bob Jones case is not in my view troublesome if it upholds the authority of the Service to challenge tax exemptions for private schools which discriminate -- as in Bob Jones -- as a matter of policy. At the same time, I believe in the Administration's support for the Service's position in the Bob Jones case could be very troublesome -- with the political benefits heavily outweighed by the political liabilities.

a change

TAB K

TDO:DV:bb

cc: Olson
Simms
Valentine
Retrieval
Subj
Files

Office of the
Assistant Attorney General

Washington, D.C. 20530

24 DEC 1981

Peter J. Wallison, Esq.
The General Counsel of the Treasury
Department of the Treasury
Washington, D.C. 20220

Dear Mr. Wallison:

In connection with our analysis of the ramifications of the Ashbrook amendment, § 616 of H.R. 4121, for future actions of the Department of the Treasury, you have requested an early response to the question whether your Department may engage in certain pending litigation. Specifically, may the Internal Revenue Service (IRS), through its Office of the Chief Counsel, consistently with the Ashbrook amendment, answer and defend petitions filed in the United States Tax Court by five formerly tax-exempt nonsectarian private schools challenging the revocation of their tax-exempt status under 26 U.S.C. § 501(c)(3), § 501(c)(3) of the Internal Revenue Code of 1954 (Code)? The notices of revocation, dated August 17, 1981, concluded that each of the five schools "no longer qualifies for continued exemption under section 501(c)(3)." These revocations occurred at a time when the IRS was, as it continues to be, subject to an injunction issued by the District Court in Green v. Miller, No. 69-1355 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980), the general thrust of which is to require the IRS to enforce more vigorously the implied prohibition in § 501(c)(3) on the eligibility for tax-exempt status of private, non-profit schools which discriminate on the basis of race.

We do not, in this memorandum, attempt to resolve the plethora of complex questions -- including those articulated by Secretary Regan in his letter to the Attorney General dated October 1, 1981 -- raised by the Ashbrook amendment. The Supreme Court may resolve some of these questions in the cases of Goldsboro Christian Schools Inc. v. United States and Bob Jones University v. United States, Nos. 81-1 and 81-3, cert. granted, 50 U.S.L.W. 3266 (U.S. Oct. 13, 1981), and Regan v.

Wright, No. 81-970, (petition for a writ of certiorari filed by the Solicitor General Nov. 23, 1981). For present purposes, we shall simply assume, without reaching questions of constitutionality, that the Ashbrook amendment was intended, at least in part, to restrict your Department's ability to comply with the injunction issued in Green v. Miller. We conclude, for the reasons set forth below, that the IRS may file answers to and defend the five petitions without violating any constraints the Ashbrook amendment may otherwise have placed on the IRS's administration of the Code.

Background

The history of the Green and Wright cases, and their interrelationship with the Ashbrook amendment, is extraordinarily complex. 1/ However, a detailed recapitulation of that history is unnecessary for resolution of the present problem. Briefly, prior to 1970, the IRS as a general rule recognized non-profit private schools not receiving state aid as tax-exempt, charitable institutions under § 501(c)(3) of the Code and as eligible donees of charitable contributions deductible under § 170(a) and (c)(2) of the Code regardless whether the school was racially discriminatory. In 1971, the District Court in Green v. Connally, 330 F. Supp. 1150, 1171, 1179 (D.D.C.) (three-judge court), aff'd mem. sub. nom. Coit v. Green, 404 U.S. 997 (1971), held, as a matter of statutory interpretation, that the Internal Revenue Code requires denial of tax-exempt status and deductibility of contributions to private schools practicing racial dis-

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1/ See Wright v. Regan, 656 F.2d 820, 823-26 (D.C. Cir. (1981) (detailing history of the case); Note, The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools, 93 Harv. L. Rev. 378, 379-84 (1979). See also Neuberger & Crumplar, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979) (general discussion of court, agency, and congressional action in this area).

crimination. 2/ Plaintiffs in *Green* reopened the litigation in 1976, alleging that the IRS had failed to enforce effectively the earlier order that racially discriminatory private schools in Mississippi be denied tax exempt status. 3/ That action resulted in a modified and amplified injunction against the IRS which went beyond the guidelines the IRS had adopted in the wake of the first *Green* decision to determine whether schools seeking or holding exempt status are in fact discriminatory. 4/ The District Court enjoined the IRS from granting

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2/ To support this determination, the court reasoned that with respect to private schools, § 501(c)(3) must be read in a manner consistent with federal civil rights legislation and the overriding national policy against racial discrimination in educational facilities. *See also Runyon* v. *McCrary*, 427 U.S. 160 (1976); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1981; Pub. L. No. 94-658, Sec. 2(a), 90 Stat. 2697 (prohibition of tax-exempt status for social club whose charter or governing instrument provides for discrimination).

3/ At the same time, parents of black children in desegregating school districts in seven States commenced a class action seeking nationwide relief on a basis similar to that sought in Mississippi in the reopened *Green* case. *See Wright* v. *Regan*, 656 F.2d 820, 825, 829-30, 835 (D.C. Cir. 1981). While *Green* has a long history and involves Mississippi schools alone, the issues in the two cases are essentially the same. Moreover, the original *Green* court specifically noted that its interpretation of § 501(c)(3) was not confined to the situation in Mississippi. Rather "[t]he underlying principle is broader, and is applicable to schools outside Mississippi with the same or similar badge of doubt." *Green* v. *Connally*, 330 F. Supp. at 1174. The Ashbrook amendment does not, on its face, distinguish between schools inside and outside Mississippi.

4/ *See, e.g.*, Rev. Proc. 72-54, 1972-2 C.B. 834; Rev. Proc. 75-50, 1975-2 C.B. 587.

tax-exempt status to private Mississippi schools: (1) adjudged racially discriminatory in adversary or administrative proceedings; or (2) established or expanded at the time of local public school desegregation unless the schools "clearly and convincingly" demonstrate that they observe nondiscriminatory policies and practices in "admissions, employment, scholarships, loan programs, athletics and extra-curricular programs." Green v. Miller, No. 69-1355, at 2 (D.D.C. May 5, 1980) (clarified and amended June 2, 1980). 5/ Subsequent to the court order, the IRS, in the course of its surveys and examinations of private schools, sent the five notices of revocation of tax-exempt status that are presently being challenged in the Tax Court under 26 U.S.C. § 7428. 6/

In order to determine whether those actions can now be answered and defended in Tax Court, they must be viewed against the backdrop of the Ashbrook amendment. Section 616, which Congressman Ashbrook offered as an amendment to the Treasury Department, Postal Service and General Government Appropriations Bill for the fiscal year 1982, provides:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, court order, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

5/ The district court has subsequently stayed its order insofar as it applies to private sectarian schools. See Suspension of Court's Orders of May 5, 1980 and June 2, 1980 (D.D.C. July 13, 1981).

6/ Section 7428 of title 26 provides that an organization whose qualification or classification under § 501(c)(3) is in issue may file within 90 days a petition in the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia, seeking a declaratory judgment with respect to such initial qualification, continuing qualification or revocation.

Section 616 passed the House on July 30, 1981. See 127 Cong. Rec. H 5398 (daily ed. July 30, 1981). It was approved by the Senate Committee on Appropriations on September 15, 1981. See 127 Cong. Rec. D 1057 (daily ed. Sep. 15, 1981). Although the House bill has not yet been enacted, the restrictions contained in § 616 were temporarily effective from October 1, 1981, until November 20, 1981, pursuant to Pub. L. No. 95-51, the continuing Appropriations Act. That Act was extended, by amendment, to December 15, 1981. See Pub. L. No. 97-85. On December 15, a joint resolution further extending these conditions for fiscal year 1982, became law. See Pub. L. No. 97-92. 7/

Section 616 is Congress' most recent attempt to limit what it perceives to be unwarranted governmental interference with private sectarian and nonsectarian schools. The amendment is substantially similar to amendments sponsored by Congressmen Ashbrook and Dornan to Treasury appropriations for fiscal years 1980 and 1981. 8/ These "riders" were intended to preserve guidelines the IRS had adopted prior to August 1978 to identify racially discriminatory private schools and to prevent the IRS from augmenting those guidelines with more aggressive procedures and detailed reporting requirements. See 125 Cong. Rec. H 589786 (daily ed. July 13, 1979); id. at H 5979-83 (daily ed. July 16, 1979); id. at S 11979-87 (daily ed. Sep. 16, 1979); id. at S 11802-854 (daily ed. Sep. 5, 1979); id. at S 11979-87 (daily ed. Sep. 6, 1979); 126 Cong. Rec. H 5196 (daily ed. June 18, 1980); id. at H 7209-7218 (daily ed. Aug. 19, 1980); id. at H 7239-7293 (daily ed. Aug. 20, 1980).

7/ Similar to Pub. L. No. 95-51, a proviso to § 101(a)(3) of Pub. L. No. 97-92 states that "when an Act listed in this subsection has been reported to a House, but not passed by that House as of November 20, 1981, it shall be deemed as having been passed by that House." The Treasury, Postal Service and General Government Appropriations Act of 1982 is listed in subsection (a) and has been reported to the floor of the Senate by the Senate Committee on Appropriations. Thus, the amendment involved here is now effective.

8/ See Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, §§ 103, 615 (1979); restriction reinstated on December 16, 1980, effective through September 30, 1981, Pub. L. No. 96-536, 94 Stat. 3166, §§ 101(a)(1), 101(a)(4); as amended Pub. L. No. 97-12, 95 Stat. 95, § 401.

Originally, these provisions were explained as attempts to rechannel the responsibility for formulating tax policy from the IRS to Congress or the courts, 9/ and they have been so interpreted by a court. 10/

The fiscal year 1982 Ashbrook amendment differs, however, in scope and impact: the earlier language was altered by inserting "court order." 11/ Inasmuch as the Ashbrook amendment can now be read *on* its face to prohibit the use of appropriations to "carry out any . . . court order . . . which would cause the loss of tax-exempt status . . . unless in effect prior to Aug. 22, 1978," there may be conflicts between § 616 and the obligations of the IRS under the modified *Green* injunction. The specific potential conflict at *issue here* is whether § 616 affects the IRS's ability to defend the actions brought in the Tax Court.

Analysis

The first question to be addressed is whether the notices of revocation sent out by the IRS on August 17, 1981, are themselves nullified by the Ashbrook amendment, which became operative on October 1, 1981. The plain language of § 616 does not indicate that it should apply retroactively. As written, it is future-oriented: no appropriations "shall be used," not "no appropriations should have been used." Nor could a provision forbidding the use of appropriations logically be read to make prior expenditures illegal. Were that possible, persons who had properly authorized the obligation of appropriations under the previous law could be subjected, *ex post facto*, to criminal prosecution under the

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9/ *See* 125 Cong. Rec. H 5882 (daily ed. July 13, 1979)(remarks of Rep. Ashbrook).

10/ *See* *Wright* v. *Regan*, 656 F.2d 820, 835 (D.C. Cir. 1981) ("riders are holding orders and they hold only the IRS, they do not purport to control judicial dispositions."), petition for *certiorari* filed, *Regan* v. *Wright*, No. 81-970 (Nov. 23, 1981).

11/ *See* 127 Cong. Rec. H 5392, 5393 (daily ed. July 30, 1981).

Antideficiency Act, 31 U.S.C. § 665, in violation of the Constitution. U.S. Const., Art. I, § 9, cl. 3. 12/

12/ We note that the Ashbrook amendment to the 1980 Appropriations Act, which was the governing law prior to October 1, 1981, did not prohibit any actions taken pursuant to a court order. (Section 103 of the Treasury, Postal Service and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 562, expired on September 30, 1980, the end of the 1980 fiscal year, but was reinstated for the period December 16, 1980, through the close of the 1981 fiscal year, by § 101 (a) (4), H.R. J. Res. 644 of Dec. 16, 1980, Pub. L. No. 96-536, 94 Stat. 3166, as amended by § 401, Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, 95 Stat. 95.) That section read:

> None of the funds made available pursuant to the provisions of this Act shall be used to formulate or carry out any rule, policy, procedure, guideline, regulation, standard, or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978.

When Congressman Ashbrook initially proposed § 103, he described it as a holding order on the IRS, not the courts. "We are just saying do not go forward with these broad regulations or procedures, . . . until the Congress or a court affirmatively acts on that subject." 125 Cong. Rec. H 5882 (daily ed. July 13, 1979) (remarks of Rep. Ashbrook). Thus, neither the plain language nor the legislative history of the 1980 fiscal year Ashbrook amendment -- the applicable law on August 17, 1981 -- prohibited sending out the revocation letters.

Although Congressman Ashbrook attempted to expand the scope of his amendment a year later so as to affect court orders as well, the Chair ruled that the amendment was out of order. 126 Cong. Rec. H 7208 (daily ed. Aug. 19, 1980). Congressman Ashbrook then offered an alternative version which was adopted by the House, with respect to which he stated: "The new version of the amendment does

(Footnote cont'd on p. 8)

In addition, a general rule of statutory construction is that retroactive application of statutes is not assumed absent explicit congressional intent to the contrary. *See Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1927) (tax which applied retroactively so as to burden past lawful transactions violated Fifth Amendment); *Billings* v. *United States*, 232 U.S. 261, 282 (1914) (statutes should be so construed as to prevent them from operating retroactively). We have carefully reviewed the legislative history and find no evidence whatsoever that Congress intended § 616 to apply retroactively. 13/ We therefore conclude that § 616 in no

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12/ (Footnote cont'd from p. 7)

not challenge the May 5 Green order . . . it does not address or seek to alter the order of Judge Hart in the Green case or the implementation of that order in the State of Mississippi." 126 Cong. Rec. H 7289 (daily ed. Aug. 20, 1980). This amendment never became law, because Congress failed to pass the 1981 fiscal year Appropriations Act. Funding was authorized pursuant to a continuing budget resolution which incorporated existing 1980 restrictions, including the earlier Ashbrook amendment. But at no point prior to the appropriation rider for 1982 did Congress regard either the Ashbrook or Dornan amendments as interfering with the enforcement of outstanding court orders. *See also* 126 Cong. Rec. S 8660 (remarks of Sen. Javits) (daily ed. July 27, 1980); 126 Cong. Rec. at H 7211 (remarks of Rep. Dornan) (daily ed. Aug. 19, 1980); *id.* at H 7212 (ruling of the Chair).

13/ *See* 127 Cong. Rec. H 5392-98 (daily ed. July 30, 1981). Indeed, during floor debate over his 1982 fiscal year version, Congressman Ashbrook himself expressed doubts that even that proposal would affect the ability of the IRS to comply fully with the *Green* v. *Miller* injunction within the State of Mississippi. *See* 127 Cong. Rec. H 5394 (daily ed. July 30, 1981) (exchange between Reps. Ashbrook and Gradison). We assume for present purposes that the 1982 fiscal year version was intended to interdict compliance with the *Green* v. *Miller* order after October 1, 1981, without deciding that issue.

way affects the administrative actions taken by the IRS on August 17, 1981. 14/

The next question is whether the IRS can defend challenges to those revocation notices brought under 26 U.S.C. § 7428 and filed in the Tax Court on November 17, 1981. Under rules of the Tax Court, the IRS must respond to at least one of the five petitions by January 11, 1982. We understand from IRS attorneys that the proceedings before the Tax Court will be ones in which any facts upon which the administrative determinations were made may be determined *de novo* by the Tax Court at trial of the causes. Any relevant evidence supporting contentions raised during the administrative revocation process may be raised before the Tax Court by either the IRS or the organization. *See Incorporated Trustees of the Gospel Workers Society* v. *United States*, 81-1 USTC ¶ 9174, n.6 (D.D.C. 1981). *But cf. Prince Edward School Foundation* v. *C.I.R.*, 473 F. Supp. 107, 110 (D.D.C. 1979) *aff'd by unpublished order* No. 79-1622, *cert. denied*, 450 U.S. 944 (1981) (judicial review limited to review for error of administrative determination). In its answers to the five petitions, the IRS expects to deny most of the paragraphs of the petitions. Trial would not be held in any of the cases until May 1, 1982, at the earliest, with legal memoranda to be submitted subsequent to the trial.

The plain language of § 616, while prohibiting the use of funds either to formulate rules and regulations or to carry out guidelines or court orders which were not in effect prior to August 22, 1978, does not address specifically the appearance of the Executive in court. We would generally be most reluctant to give § 616 a reading that Congress

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14/ Analogously, the Court of Appeals in *Wright* v. *Regan*, *supra* at 832-35, reached a parallel conclusion that the enactment by Congress of the Ashbrook amendment (Section 103) and Dornan amendment (Section 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 9674, 93 Stat. 559, was prospective in operation: an attempt to stay further IRS initiatives.

intended to bar the Executive Branch from performing its quintessential function of appearing in court to support legally authorized actions it had previously taken. We would be particularly reluctant to give such a reading to a statute making appropriations (and, as here, denying the use of appropriations), because such a statute does not amend underlying substantive law -- it merely suspends the use of appropriations for so long as the statute remains in force. It would also, we believe, be anomalous to attribute to Congress in 1981 an intent on the one hand to leave the notices of revocation unchanged and an intent on the other hand to prohibit the defense of those administrative notices in the Tax Court. Such potentially inconsistent effects should be resolved, if possible, in favor of permitting the agency to defend its prior, permissible actions, rather than forcing a reading that would require the Executive to default in court. Moreover, our earlier conclusion -- that Congress did not intend to nullify the letters of revocation -- leaves the underlying substantive rule of law to be relied upon in the Tax Court outstanding. Cf. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 431 (1855) (Congress explicitly changes the substantive rule of law supporting prior decision). If neither § 501(c)(3) nor the notices of revocation have been amended or extinguished, it would be illogical to find in the Ashbrook amendment an intent to prohibit the Executive from responding to challenges to the revocation letters.

Notwithstanding these considerations, however, the complex history of the Ashbrook amendments suggests that we should examine the manner in which the defense in the Tax Court might be construed as carrying out a court order, namely the Green v. Miller injunction, entered after August 22, 1978, and therefore as potentially violative of the spirit of the Ashbrook amendment. Significantly, the modified Green v. Miller injunction does not mention the issue of the IRS defending actions in the Tax Court. Nor would the district court judge presume to dictate the proceedings in another tribunal. Cf. CTE Sylvania, Inc. v. Consumers Union of the United States, 445 U.S. 375 (1980) (agency complying with order in one court's proceeding should not be required to commit contempt of that court because of contradictory order from another court). The Tax Court functions independently in determining what legal standard should govern under the present circumstances and whether or not the petitioner organizations are tax-exempt. See Prince Edward

School Foundation v. *C.I.R.*, 478 F. Supp. 107, 111-12 (D.D.C. 1979), *aff'd by unpublished order*, No. 79-1622 (D.C. Cir. June 30, 1980), *cert. denied*, 450 U.S. 944 (1981) (validity of particular revenue procedure does not bear on court's interpretation of the prerequisites for § 501(c)(3) status and its ultimate decision whether or not plaintiff is exempt under that section). Therefore, the IRS, as an initial matter, would not logically turn to the rules developed in the recent *Green* order for instruction as to its present defense to the challenges under 26 U.S.C. § 7428 in the Tax Court.

Several options, independent of the modified *Green* injunction and compatible with the Ashbrook amendment, would be available to the IRS in the Tax Court proceedings. The IRS could base its defense of the revocations on a determination that the schools involved have violated Rev. Proc. 75-50 or other pre-August 22, 1978 law, either by failing to demonstrate affirmatively the adoption, communication and observance of a nondiscriminatory policy or by failing to fulfill the equivalent duty of a meaningful communication of a nondiscriminatory policy. 15/ Under this analysis, the IRS would take the position that the schools have allegedly failed to demonstrate that they operate on a racially nondiscriminatory basis in conformity with the original order in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.) (three-judge court) *aff'd sub. nom. Coit* v. *Green*, 404 U.S. 997 (1971), and Rev. Proc. 75-50, both of which were consciously left undisturbed by the Ashbrook amendment.

15/ Rev. Proc. 75-50, Sec. 2.02 specifically requires that "[a] school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." *See also Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C. 1971) (three-judge court) (school must publicize policy in manner that is intended and reasonably effective to bring it to attention of students of minority groups).

It is also possible that, at some time during the litigation in the Tax Court, the IRS might desire to argue that the schools had not successfully rebutted a factual inference of discrimination raised by the circumstances surrounding their creation, or their substantial expansion, at approximately the time of a local desegregation order. While such a position could arguably be linked to the language of the modified Green v. Miller injunction, the IRS had actual knowledge of the relevant facts surrounding the schools' formation independent of that court order. See Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969)(three-judge court); Green v. Connally, supra at 1173; Norwood v. Harrison, 382 F. Supp. 921, 924-26 (N.D. Miss. 1974). These cases treated evidence of a school's formation or expansion at times reasonably proximate to public school desegregation litigation as sufficient to create a "badge of doubt." The IRS could assert this well-recognized and accepted inference in its present defense should it choose to rely on that inference. 16/

Another aspect of the Tax Court defenses which arguably could be viewed as "carrying out" the modified Green v. Miller injunction in violation of § 616 would involve the IRS's resort to the "clear and convincing" evidence standard that the modified Green decree imposes on the schools in order to overcome a prima facie case of discrimination. Of course, the IRS has no way of predicting exactly what burdens of proof the Tax Court might eventually place on the litigants. 17/ We are informed that a "clear and convincing" standard of proof is extremely rare in Tax Court proceedings. Moreover, as indicated above, the district court in Green in no way displayed a purpose to prescribe the rebuttal standard to be employed in the Tax Court.

16/ See also Brumfield v. Dodd, 425 F. Supp. 528, 531-32 (E.D. La. 1977) (adopting Norwood v. Harrison, 382 F. Supp. 921 (N.D. Miss. 1974), standard that "the critical time of a private school's formation or unusual enlargement must be a significant factor, though one not necessarily decisive, in determining whether it is racially discriminatory").

17/ See Prince Edward School Foundation v. C.I.R., supra at 110-11; Western Catholic Church v. Commissioner, 73 T.C. 196, 206 (1979); Hancock Academy of Savannah, Inc. v. Commissioner, 69 T.C. 488, 492 (1977) (burden of proof on petitioner; exact standard not addressed).

More importantly, should the IRS, to sustain its case, desire to argue that such a standard should control, it need not invoke the modified *Green* injunction to support its position. Rather, it can point to the burdens of proof developed in *Norwood v. Harrison*, *supra* at 924-26, on remand from the Supreme Court, 413 U.S. 455, 471 (1973); an approach reaffirmed *Brumfield v. Dodd*, 425 F. Supp. 528, 531-32 (E.D. La. 1977). 18/ These cases predate August 22, 1978, and we do not read the Ashbrook amendment as intending to affect those decisions or to prohibit the IRS from arguing their relevance and applicability in the Tax Court proceedings. Given these precedents and the lack of a firm position by the IRS whether the *Norwood* inference should apply at all, we see no conflict, at least in the immediate future, between the Ashbrook amendment and the filing of an answer to the five petitions in the Tax Court or, generally, the defense of those actions.

At a more fundamental level, the IRS defense does not violate the basic thrust of § 616. Congress neither intended to change the law proscribing tax-exempt status for discriminatory schools nor desired to impinge on the IRS' ability to withdraw the tax-exempt status of schools that do discriminate. Indeed, in reiterating his initial intention this year, Congressman Ashbrook stated:

> I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS' ability to

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18/ Similarly, the court in *United States v. State of Mississippi*, 499 F.2d 425, 434-35 & n.17 (5th Cir. 1974) (*en banc*) interpreted *Norwood* to require that the litmus test for receiving governmental support was *actual* evidence of nondiscrimination not a simple statement of a nondiscriminatory policy.

> withdraw the tax exempt status of any school which might violate the law. 127 Cong. Rec. H 5396 (daily ed. July 30, 1981). 19/

These proceedings will give the court an opportunity to consider what rules should be used to determine nondisdiscrimination -- a result sought by Congressman Ashbrook when he first introduced his amendment. 20/ Thus, the Tax Court proceedings function to further, rather than to undermine, the spirit of the Ashbrook amendment. We therefore conclude that the IRS defense in the Tax Court violates neither the letter nor the spirit of § 616.

19/ See also 127 Cong. Rec. H 5393 (daily ed. July 30, 1981) (remarks of Rep. Lott) ("If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978.").

20/ The governing statute, 26 U.S.C. § 7428(c)(1), explicitly provides that any individual contributions up to $1,000 made to the school during the pendency of the proceedings are deductible, regardless of the eventual outcome of the litigation. Congress fashioned the proceeding involved here in response to the Supreme Court's suggestion that "specific treatment of not-for-profit organizations to allow them to seek pre-enforcement review" might be a method for alleviating "[t]he degree of bureaucratic control that, practically speaking has been placed in the Service [and] . . . is susceptible of abuse, regardless of how conscientiously the Service may attempt to carry out its responsibilities." Bob Jones University v. Simon, 416 U.S. 725, 749-50 (1974). See H.R. Rep. No. 94658, 94th Cong., 1st Sess. 282, 283-84; S. Rep. No. 94-938, 94th Cong., 2d Sess. 585-87 (basis for enacting Sec. 1306(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520).

We are continuing our review of other issues raised in the Secretary's letter to the Attorney General, particularly the potential effect of the Ashbrook amendment on the responsibility of the IRS to notify two "paragraph 1" schools 21/ of their reporting obligations under the modified *Green* injunction. We will remain in touch with your office and IRS attorneys in our efforts to resolve this matter.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

21/ Paragraph 1 schools are schools which in the past have been determined in court or administrative proceedings to be racially discriminatory, or were established or expanded at or about the time the districts in which they are located were undergoing desegregation and which cannot demonstrate that they do not presently discriminate. *See Green* v. *Miller*, No. 69-1355, Order and Permanent Injunction (D.D.C. May 5, 1980) (clarified and amended, June 2, 1980). Even if the school establishes that it observes a nondiscriminatory policy, the IRS is enjoined from continuing its tax-exempt status if the school fails to supply certain information annually for a period of three years.

TAB L

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General

JOHN F. MURRAY
Acting Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT S. POMERANCE
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether non-profit corporations operating private schools that, on the basis of religious doctrine, maintain racially discriminatory admissions policies or other racially discriminatory practices, qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, eligible to receive charitable contributions deductible by the donor under Section 170.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No. 81-1. The order of the district court (Pet. App. 5a-18a) is reported at 436 F. Supp. 1314. The opinion of the court of appeals (Pet. App. 1a-3a) is not reported.

No. 81-3. The opinion and order of the district court dated December 26, 1978 (Pet. App. A38-A71) are reported at 468 F. Supp. 890. The opinion and order of the district court dated May 14, 1979 (Pet. App. A72-A86) are not reported. The opinion of the court of appeals (Pet. App. A1-A37) is reported at 639 F.2d 147.

JURISDICTION

No. 81-1. The judgment of the court of appeals (Pet. App. 53a) was entered on February 24, 1981, and the court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc on April 7, 1981 (Pet. App. 55a). The petition for a writ of certiorari was filed on July 2, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-3. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 81-3. The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). The order denying a petition for rehearing was entered on April 8, 1981 (Pet. App. A100-A101). The petition for a writ of certiorari was filed on July 1, 1981, and was granted on October 13, 1981, to be consolidated with No. 81-1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 170(a), 170(c), 501(a), 501(c)(3), 3121(b)(8)(B) and 3306(c)(8) of the Internal Revenue Code of 1954 (26 U.S.C.), and of Section 1.501(c)(3)-1(d) of the Treasury Regulations on Income Tax (26 C.F.R.) are set forth at Appendix, *infra*, 1a-5a.

STATEMENT

A. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. is a nonprofit organization incorporated in 1963 under the laws of North Carolina. Its articles of incorporation provide that its purpose is "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *" (Pet. App. 6a). _/ At least since 1969, petitioner has maintained a regularly scheduled curriculum, a regular faculty, and a regularly enrolled student body for kindergarten and grades one through twelve (J.A. 6). During that period, petitioner has satisfied the requirements of North Carolina for secular

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_/ Unless otherwise indicated, "Pet. App." and J.A. references in this portion of the Statement are respectively to the appendix to the petition and record appendix in Goldsboro Christian Schools (No. 81-1).

education in private schools. _/ For the school year 1973-1974, petitioner enrolled approximately 750 students (Pet. App. 7a; J.A. 6-7). Submissions to the State indicate that petitioner requires its high school students to take one Bible-related course during each semester. The remaining course requirements and offerings, as reflected on those submissions, are indicative of secular subjects. Whether the subject of the course is secular or Bible-related, petitioner's practice is to begin each class with a prayer. This practice is in keeping with petitioner's overall purpose, and the desire of its founders, to provide a secular private school education in a religious setting (Pet. App. 6a-7a). _/ Petitioner does not require that its students profess any particular belief or subscribe to any particular belief. It does require, however, that its students adhere to certain standards of conduct that are consistent with the tenets of petitioner (J.A. 68). Thus, various religious denominations are represented in the student body (J.A. 69-70).

Based upon an interpretation of the Bible that it purports to follow, petitioner has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the

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_/ Pursuant to N.C. Gen. Stat. §115-255 (1978 repl.), the State of North Carolina regulates and supervises all nonpublic schools within the State serving children of secondary-school age, or younger, "to the end that all children shall become citizens who possess certain basic competencies necessary to properly discharge the responsibilities of American citizenship." In accordance with that statute, all such nonpublic schools —

> shall meet the State minimum standards as prescribed in the course of study, and the children therein shall be taught the branches of education which are taught to the children of corresponding age and grade in the public schools * * *.

_/ Athough the Second Baptist Church of Goldsboro was active in petitioner's founding and operation, petitioner was incorporated as a separate legal entity (Pet. App. 6a-7a; J.A. 5-6).

nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God" (J.A. 10). Although the policy would seem to require the exclusion of all noncaucasians, petitioner has accepted noncaucasions. Its policy in practice requires the exclusion only of members of the Negro race (Pet. App. 7a). Petitioner's president and principal believe that black students would be disinclined to abide by its tenets and practices because of the racial climate prevailing in the country and the pressures exerted by the positions of certain "militant" organizations (J.A. 81-93).

Petitioner has never received recognition from the Internal Revenue Service as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) On July 10, 1970, the Internal Revenue Service announced publicly that it could no longer justify its prior allowance of tax-exempt status to private schools maintaining racially discriminatory admissions policies, nor could it continue to treat gifts to such schools as charitable contributions that are deductible by the donor for income tax purposes (No. 81-3 - J.A. A235-236). _/ On audit, the Commissioner of Internal Revenue thereafter determined that petitioner did not qualify for exemption from federal social

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_/ As a result of its announced policy, which was formally published in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, the Internal Revenue Service did not appeal from the order of a three-judge district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), prohibiting the Commissioner from conferring tax-exempt status on private schools in Mississippi maintaining racially discriminatory admissions policies, and from allowing the deductibility of contributions to such schools as charitable contributions. The *Green* suit had been brought by a group of Mississippi parents and their children attending the public schools. In response to an appeal of the district court's order by intervenors seeking to vindicate their asserted First Amendment right to freedom of association, the government filed a motion to dismiss. No. 71-425. This Court, however, affirmed without opinion. *Coit* v. *Green*, 404 U.S. 997 (1971). See p. ___, n. ___, *infra*.

security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code. In 1974, the Commissioner accordingly assessed FICA and FUTA taxes against petitioner. After making partial payment, petitioner instituted this action in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 in federal withholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period (Pet. App. 5a, 7a-8a).

2. On the parties' cross motions for summary judgment, the district court ruled that the Internal Revenue Service had properly denied petitioner exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization, because petitioner's racially discriminatory admissions policy violated the declared public policy of the United States (Pet. App. 14a). For purposes of adjudicating the motion, the court assumed that petitioner's racially discriminatory admissions policy was based upon a valid religious belief (Pet. App. 7a). It concluded, however, that denying petitioner the benefits of a Section 501(c)(3) tax exemption did not abridge any rights guaranteed petitioner under the Fifth Amendment to the Constitution or under the

Establishment or Free Exercise Clauses of the First Amendment (Pet. App. 12a-13a). _/

The court of appeals affirmed, with one judge dissenting. Treating the case as "identical" to Bob Jones University, the court of appeals upheld the Internal Revenue Service's action on the authority of its decision in that case (Pet. App. 1a-3a). The court observed (Pet. App. 2a):

> It is rare that any two cases are identical twins. Nevertheless, as it happens, there is identity for present purposes between the instant case and the case of Bob Jones University * * * which has just been handed down. There the taxpayer was held not to be entitled to the §501(c)(3) exemption. In some respects, insofar as decision here is concerned, the resemblance of Goldsboro to Bob Jones University is stronger than would be the case the other way round. That is so since Goldsboro altogether prohibits admission of blacks. The University permits them to enter, but forbids certain interracial associations, especially dating and marriage.
>
> The complete and impeccable treatment by Judge Hall in Bob Jones University makes it supererogatory for us to discuss the issue of tax exempt status under §501(c)(3). For that aspect we simply affirm the district court for the reasons advanced in the Bob Jones University case.

B. Bob Jones University - No. 81-3

1. Petitioner is a non-profit organization incorporated in 1952 under the laws of South Carolina. As set forth in its certificate of incorporation, its purpose is "'to conduct an institution of learning for the general education of youth in the essentials of culture and in the arts and sciences, giving

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_/ During the pendency of the proceedings in the district court, the government agreed to abate all FUTA assessments against petitioner for periods ending on or before December 31, 1970, and to abate all FICA assessments against petitioner for periods ending before November 30, 1970 (J.A. 104, 111-112). The government made this concession because the Internal Revenue Service's announcement that it would no longer accord the benefits of tax exemption and deductibility of contributions to racially discriminatory private schools was effective as of November 30, 1970 (J.A. 104, 111-112). See Internal Revenue Code of 1954, Section 7805(b) (26 U.S.C.). The government accordingly stipulated that it was entitled to recover only $116,190.99 upon its counterclaim, and the district court entered judgment in its favor in that amount (J.A. 109-110, 115).

special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures * * *'" (Pet. App. A2-A3, A40-A41). _/ Petitioner enrolls students from kindergarten through college and graduate school (Pet. App. A3, A41; J.A. A63, A153, A211-A223). At the college level, it operates a school of education, a school of fine arts, a school of religion, a college of arts and sciences, and a school of business administration (J.A. A63, A127-128). In its graduate schools, it offers courses in art, music, speech, radio and television, cinema, religion, and education (J.A. A227). It enrolls more than 5,000 students and offers more than 50 accredited degrees in secular subjects (Pet. App. A3, A41; J.A. A63, A127-A128). Its various degrees (including its teaching degree which satisfied state law requirements) generally enable its graduates to qualify in the professional world on the same basis as graduates from other recognized educational institutions (J.A. A76, A88-A89, A269-A271). _/ Petitioner operates from fees for tuition, room, and

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_/ Unless otherwise indicated, "Pet. App." and J.A. references in this portion of the Statement are respectively to the appendix to the petition and the joint appendix in Bob Jones University (No. 81-3).

_/ Until 1972, the Veterans Administration recognized petitioner as an educational institution offering courses of study suitable for the education of veterans who were recipients of subsidies under the educational benefits program administered by the Veterans Administration. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600-601 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this period, petitioner's courses of study were certified to be suitable for the education of veterans by the South Carolina State Board of Education, using criteria prescribed by federal statute. Ibid. See 38 U.S.C. Sec. 1771 et seq. In November 1972, the Veterans Administration terminated the right of otherwise eligible veterans to receive veterans' benefits for education at Bob Jones University based upon a determination by the Veterans Administration that petitioner had failed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000d et seq.) and with the Veterans Administration regulations implementing the statutory requirement of nondiscrimination in federally assisted programs. See Bob Jones University v. Johnson, supra, 396 F. Supp. at 598-599. Upon petitioner's complaint for review, the district court and the court of appeals sustained the administrative order of termination. Bob Jones University v. Johnson, supra.

board. Gifts and contributions are allocated to expansion (Tr. 85).

Petitioner draws its student body from all over the United States and the world. As its 1975-1976 Catalog Bulletin stated, "One of the unusual features of Bob Jones University is that as a private liberal arts university it attracts its student body from practically all the states plus the District of Columbia, the outlying possessions of the United States, and more than a score of foreign countries" (J.A. A221). Petitioner engages in extensive recruiting activities to attract students (J.A. A77, A80-81, A85-A86, A89, A93-A94). It regards its function as "to serve the general public meeting their spiritual needs" (J.A. 75-76).

Petitioner also offers a separate nondegree, noncredit program entitled Institute of Christian Service, for persons who do not wish to undergo the rigors of academic pursuit (J.A. A75). The purpose of that program is to teach the principles of the Bible and to train Christian character (Pet. App. A3, A41). All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians. Students are screened as to their religious beliefs and their conduct is strictly regulated (Pet. App. A3-A4). However, more than 100 denominations are represented in the student body (J.A. 84).

From its inception, petitioner has, based upon religious doctrine, maintained a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. These policies were based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the scriptures (Pet. App. A43). Prior to 1971, petitioner excluded blacks entirely from enrollment. From 1971 until 1975, married black persons and members of other minority races or ethnic groups were not excluded from enrollment, but petitioner continued to deny admission to unmarried blacks unless the applicant had been a staff member of petitioner for at least four years (Pet. App. A4, A43). See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, petitioner's doctrinal policy did not specifically require the exclusion of blacks, but denying admission to unmarried blacks was, in petitioner's judgment, the best means of implementing its prohibition against interracial dating and marriage _/ (Pet. App. A43, J.A. A71-A72, A81-A82, A250; A209-210, 212). _/

In response to the court of appeals' decisions in April and May 1975, in Bob Jones University v. Johnson, 529 F.2d 514 (4th Cir. 1975), and in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), petitioner once again revised its admissions policy (Pet. App. A4, A43-A44; J.A. A250-A253). After May 29, 1975, petitioner generally permitted unmarried

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_/ Petitioner's president explained the connection between its facially discriminatory admissions policy and interracial dating and marriage, in the following terms (A. 210):

> We accept a few Oriental students, but we do so with a definite understanding that they will not date outside of their own race. If we took Negro students here on this same basis today, they would resent that restriction and would cry that they were being discriminated against because they were not allowed to date Orientals or Caucasians. If we had to expel a black student today for the worst possible offense — stealing, attempted rape, or something of that sort — he would cry that he was being persecuted because he was black; and we would be picketed, annoyed, and harassed. The very attitude of the integrationist today makes it impossible for us to find any basis on which we can accept Negro students without violating Christian and Scriptural principles and without being put in a position where we could be harassed, annoyed, and threatened.

_/ "A." refers to the separately bound record appendix filed in the court of appeals, Nos. 79-1215 and 79-1216.

blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage (Pet. App. A4, A43-A44). _/ It also established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate petitioner's rules and prohibitions against interracial dating (Pet. App. A4, A44; J.A. A53-A54, A77-A80, A197-A198, A208-A209, A277). Petitioner required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions (Pet. App. A42-A43; J.A. A132-A133).

Until 1970, the Internal Revenue Service recognized petitioner as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On November 30, 1970, the Internal Revenue Service sent letters to approximately 5,000 organizations operating private schools, including petitioner, announcing that it would no longer recognize as legally entitled to tax exemption, or to receive deductible charitable contributions, any private school that maintained a racially discriminatory admissions policy (J.A. A232-A234). See Green v. Connally, 330 F. Supp. 1150, 1173 (D.D.C.), aff'd, 404 U.S. 997 (1971). The letter requested proof of a nondiscriminatory admissions policy and advised that tax-exempt ruling letters would be reviewed in light of the

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_/ Applicants to petitioner specified their race and marital status on their applications for admissions (J.A. A122-A133). If an application form indicated that an applicant was black, but did not reveal the race of the applicant's spouse, petitioner requested that additional information (J.A. A89-A90).

information provided. At the end of 1970, petitioner responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Internal Revenue Service therefore commenced administrative proceedings leading to the revocation of petitioner's tax exemption. and of its advance assurance of deductibility. After petitioner's attempt to enjoin those proceedings had failed in this Court (see Bob Jones University v. Simon, 416 U.S. 735 (1974), _/ in January 1976, the Internal Revenue Service issued a final notice of revocation to petitioner, effective as of December 1, 1970 (Pet. App. A40, A87-A88, A89).

2. Seeking to reinstate its exemption, petitioner brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975 (Pet. App. A3, A40). _/ The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975 (ibid.). Following a trial, the district court held that petitioner qualified for tax exemption under Section 501(c)(3) of the Code as an institution organized and operated exclusively for religious and educational purposes, and that petitioner was not required to demonstrate a nondiscriminatory racial policy in order to so qualify (Pet. App.

_/ While the administrative proceedings preliminary to the revocation of its exemption were pending, petitioner sought injunctive relief to prevent the Internal Revenue Service from taking final action on the revocation. Bob Jones University v. Simon, supra, 416 U.S. 725. This Court unanimously held that the action was barred by the Anti-Injunction Act (26 U.S.C. (& Supp. III) 7421(a)) and by the Declaratory Judgment Act (28 U.S.C. (& Supp. III) 2201), but suggested (416 U.S. at 746) the refund suit procedure ultimately employed by petitioners here.

_/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. 3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

A45-A71). In a separate suit against the Secretary of the Treasury and the Commissioner of Internal Revenue instituted by petitioner, the district court thereafter ordered those officials to restore petitioner's tax exempt status and to publish advance assurances of deductibility of contributions to petitioner (Pet. App. A72-A86).

The court of appeals reversed (Pet. App. A1-A17), with one judge dissenting (Pet. App. A18-A37). _/ It rejected the district court's hypothesis that petitioner was entitled to tax exempt status because it is a "religious" institution and qualifies under the separately enumerated "religious" category of Section 501(c)(3). The court rejected "[t]his simplistic reading of the statute" as one that "tears section 501(c)(3) from its roots" (Pet. App. A7). Citing with approval the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against its background in the law of charitable trusts. Thus, the court of appeals agreed with the Green decision (330 F. Supp. at 1156-1160) that to be eligible for tax exempt status, "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy" (footnote omitted) (Pet. App. A7-A8; footnote omitted). It observed that "[t]his view finds additional support in the statutory framework itself: Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable'" (Pet. App. A7-A8, n.6). Here, it stated, petitioner's racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination. Since there is a

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_/ The court of appeals stayed the district court's injunctive order pending appeal and consolidated both suits into a single appeal (Pet. App. A97-A99).

government policy against subsidizing racial discrimination in education, public or private, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status * * *" (Pet. App. A10).

In so holding, the court rejected petitioner's argument that the application of the Service's nondiscrimination policy to petitioner violates the Free Exercise and Establishment Clauses of the First Amendment. Assuming that petitioner's racial discrimination is motivated by sincere religious beliefs, the court noted that the Internal Revenue Service's policy would not prohibit petitioner from adhering to its teachings or force any individual student to violate his beliefs (Pet. App. A13-A14). The court further concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

SUMMARY OF ARGUMENT

1. The court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining that, because of their undisputed racially restrictive admissions policies and other discriminatory policies, petitioners failed to qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code of 1954, or as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2) of the Code.

a. Since 1970, the Internal Revenue Service Service has uniformly ruled that a private school will not qualify for those federal tax benefits unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis. That ruling, concurred in by the President at the time of its promulgation, and the decisions below upholding it, are amply supported by the Constitution, by decisions of this Court, and by Acts of Congress evidencing a strong national commitment to the eradication of racial discrimination generally, and, in particular, racial discrimination by educational institutions, public and private. See, e.g., Amendments XIII, XIV, XV; Runyon v. McCrary, 427 U.S. 160 (1976); Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981; Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. That commitment springs from the principle that "'[d]istinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). It reflects also the centrality of education to a democratic society and the peculiarly injurious effects of the stigma engendered by discrimination in the classroom. Brown v. Board of Education, 347 U.S. 483, 493-495 (1954); Bolling v.

Sharpe, 347 U.S. 497, 500 (1954). Indeed, this Court's opinion in Runyon v. McCrary, 427 U.S. 160 (1976), suggests that while petitioners may have a right to teach doctrines of racial separation, they cannot maintain racially discriminatory admissions policies and other similar practices if they are commercially operated and otherwise open to the general public. Such conduct violates 42 U.S.C. 1981, which provides that all persons shall have the same right to make and enforce contracts as is enjoyed by white citizens.

b. Given the highly articulated national policy against racially segregated education, the Commissioner of Internal Revenue was amply justified in concluding that petitioners were not "charitable" organizations within the meaning of Section 501(c)(3) or eligible for "charitable contributions" deductible under Section 170(c) of the Code. The origin, structure, and legislative history of those provisions demonstrate that Congress intended to grant the benefits of tax exemption and to permit deductibility of contributions only to those organizations whose operations are "charitable," as that term is used at common law. Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924); Helvering v. Bliss, 293 U.S. 144, 147 (1934). H.R. Rep. No. 1860, 75th Cong., 3d Sess. 19 (1938). As the sponsor of a predecessor to the current exemption provision explained, the exemption was designed to aid institutions devoted exclusively to the relief of suffering and to all things which commend themselves to every charitable and just impulse. 44 Cong. Rec. 4150 (1909). Accordingly, both the Internal Revenue Service and the courts have viewed the tax statutes against their background in the law of charitable trusts, and have properly ascribed primacy to the term "charitable" in the tax exemption provisions. This interpretation is supported by the 1959 revision of the the Treasury Regulations on Income Tax (1954

Code), Section 1.501(c)(3)-1(d)(2), as well as the language of Section 170(c)(2), which allows a deduction for "charitable contributions." Those Regulations have been extant during repeated congressional examination of the exempt organization provisions and particularly amendments to Section 501(c)(3). The Regulations are therefore an authoritative interpretation as to which Congress is deemed to have given its approval. See, e.g., Helvering v. Winmill, 305 U.S. 79, 82-83 (1938); Lykes v. United States, 343 U.S. 118, 127 (1952).

The Service has accordingly ruled that, since private schools which practice racial discrimination are not classified as charities under the law of charitable trusts and violate sharply defined public policies, they provide no public benefit warranting the granting of a tax exemption and eligibility for deductible "charitable contributions" under Section 170. Rev. Rul. 71-447, 1971-2 Cum. Bull. 230. That position was first upheld in the seminal opinion of the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), upon whose analysis we rely.

Apart from the decision below, the Green ruling has been followed in Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981). These decisions are in accord with rulings of this Court sustaining the disallowance of tax deductions that would frustrate sharply defined state or national policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958); Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941). Indeed, since tax exemption and eligibility for deductible contributions constitute an indirect government subsidy in the form of matching grants, the Commissioner could well conclude, as did the three-judge district court in Green v. Connally, supra, 330 F. Supp. at 1164, that conferring tax exempt status upon racially discriminatory private schools would pose serious constitutional problems that could be avoided by requiring nondiscrimination as a prerequisite to tax exemption. "Racial discrimination in state-operated schools is barred by the Constitution and "'[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" Norwood v. Harrison, 413 U.S. 455, 465 (1973), quoting Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967).

c. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it. Indeed, Congress has made other statutory changes based upon the validity of that interpretation.

Shortly after the Service announced its policy, the Commissioner testified before a Senate Committee which thoroughly explored the Service's policy and its enforcement. In 1976, Congress extended the nondiscrimination principle to the tax exempt status of social clubs by adding the provision now contained in Section 501(i) to the Code. In reporting the measure, both the Senate and the House Committee Reports cited with approval the three-judge district court's opinion in Green v. Connally, supra, for the proposition that "discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))."

Finally, the more recent enactment by Congress of the Ashbrook and Dornan Amendments further strengthens the case for congressional acquiescence in the Service's substantive legal position. For the legislative history shows that Congress, in temporarily barring the employment of new procedures to enforce the policy of the Internal Revenue Service, intended to leave fully intact, and indeed to sanction, the existing nondiscrimination policy of the Service. In these circumstances, the Service's statutory interpretation should be upheld as conforming with Congress' interest. *Board of Governors of the Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248, 251 (1978). Moreover, during the last decade, numerous bills have sought to alter the Service's nondiscrimination principle, but none of them has been enacted. "There could hardly be a clearer indication of congressional agreement with the view [announced by the Commissioner's interpretation that racially discriminatory private schools are not tax-exempt under Section 501(c)(3))" *Runyon* v. *McCrary*, *supra*, 427 U.S. at 174-175; *Joint Industries Board* v. *United States*, 391 U.S. 224, 228-229 (1968).

2. Both Goldsboro Christian Schools and Bob Jones University seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their discriminatory practices are the outgrowth of sincere religious faith. But as the court of appeals correctly concluded, the unquestioned First Amendment right to free religious belief and exercise does not carry with it a guarantee of any person's or corporation's entitlement to tax-exempt status. The Internal Revenue Service's ruling does not purport to interfere with petitioners' right to espouse and teach religious doctrine, or with the right of any student to adhere to such doctrine. Indeed, in a press release issued nine days after the ruling involving private schools, the Service specifically indicated that its position did not affect selectivity of students by a religious seminary. By requiring them to demonstrate racially nondiscriminatory policies as a condition to receiving federal

tax exemption and eligibility for charitable contributions, the Internal Revenue Service did not encroach on any activity to which this Court has accorded affirmative constitutional protections. See Norwood v. Harrison, 413 U.S. 455, 464 n.7, 468-470; Runyan v. McCrary, 427 U.S. 160, 175-179 (1976). Hence, the Service's ruling does not violate the Free Exercise Clause of the First Amendment.

Nor does the nondiscrimination principle of the Internal Revenue Service transgress values under the Establishment Clause. As the court below properly observed (No. 81-3 Pet. App. A15-A16), "the uniform application of the rule to all religiously operated schools [as well as nonreligious schools] avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief (emphasis supplied)." Hence, the Service's policy does not prefer one religion over another or provoke entanglement in matters of church doctrine that would implicate the Establishment Clause.

ARGUMENT

NONPROFIT PRIVATE SCHOOLS THAT, ON THE BASIS OF RELIGIOUS DOCTRINE, PRACTICE RACIAL DISCRIMINATION, DO NOT QUALIFY AS TAX-EXEMPT ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE

A. The Commissioner of Internal Revenue acted within his statutory authority in ruling that racially discriminatory private schools are not tax-exempt under Section 501(c)(3) and are therefore not eligible for charitable contributions deductible under Section 170

1. These consolidated cases present an important question with respect to the Internal Revenue Service's statutory authority to administer the law governing the tax-exempt status of private schools. As this Court observed in an earlier procedural chapter of this litigation involving petitioner Bob Jones University, an organization's receipt of tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and its consequent inclusion in the Internal Revenue Service's Cumulative List of Organizations described in Section 170(c) "assures potential donors in advance that contributions to the organization will qualify as charitable deductions under §170(c)(2)," Bob Jones University v. Simon, 416 U.S. 725, 729 (1974). Because the Service generally permits a donor to rely on the Cumulative List, "appearance on the Cumulative List is a prerequisite to successful fund raising for most charitable organizations" (id. at 729-730).

Tax-exempt status under Section 501(c)(3) and eligibility for tax deductible charitable contributions constitute a substantial financial benefit and form of indirect government support. To begin with, such status confers exemption from income taxes on net income, the federal social security taxes (26 U.S.C. 3121(b)(8)(B)), and the federal unemployment taxes (26 U.S.C. 3306(c)(8)). But more importantly, an organization's tax-exempt status permits donors to reduce their tax liability by means of charitable contributions to the organization. Thus, the net cost of every dollar given to a Section 501(c)(3) organization by a donor in the 50% marginal tax bracket is only 50 cents. In real economic terms, the ability of such a donor to make a $1 contribution at a net cost of 50 cents therefore represents a form of indirect government support or "contribution" of 50 cents to the donee organization.

Thus, the tax laws make the government a partner in the multiple forms of private philanthropy that abound in the Nation. _/ And such charitable pluralism is widely regarded as a healthy phenomenon providing important benefits to society as a whole. _/ Private philanthropy can accomplish tasks that are unsuited for the government to perform. But not all forms of private philanthropy are eligible for tax benefits. As we shall show in greater detail, the basis for conferring tax exemptions and benefits upon such private philanthropy was Congress' belief that "the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare" H.R. Rep. No. 1860, 75th Cong., 3d Sess., p. 19 (1938).

Tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170 therefore rest on the sound congressional policy that a qualifying organization must

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_/ Of course, this does not mean that the tax-exempt institutions become arms of the government subject to the constitutional strictures on governmental action. See Walz v. Tax Commission, 397 U.S. 664, 675-677 (1970).

_/ See Green v. Connally, 330 F. Supp. 1150, 1162-1163 (D.D.C. 1971), aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971); Saks, The Role of Philanthropy: An Institutional View, 46 Va. L. Rev. 516, 524 (1960); Stone, Federal Tax Support of Charities and Other Exempt Organizations: The Need for a National Policy, 1968 S. Calif. Tax Inst. 2-7.

promote the general welfare. This limitation, as we shall show, is consistent with the law of charitable trusts; that a "charitable" trust is one formed to serve the general welfare and benefit the community at large. As this Court observed more than 100 years ago in Ould v. Washington Hospital for Foundlings, 95 U.S. 303, 311 (1877), "A charitable use, where neither law nor public policy forbids, may be applied to almost any thing that tends to promote the well-doing and well-being of social man."

2. Here, petitioner Goldsboro Christian Schools concedes (Pet. 6) that it "has maintained a racially discriminatory admissions policy since its founding." It simply refuses to admit black students. Although petitioner Bob Jones University maintained a similar discriminatory admissions policy prior to 1971, and until May, 1975, refused to admit any black applicant who was not married, it now denies admission to any applicant known to be a partner in an interracial marriage, and enforces strict disciplinary rules against interracial dating (see pp. ___, supra). Thus, Bob Jones University imposes rules upon its student body based upon racial classifications.

Petitioners' racially restrictive policies, in offering services that they otherwise make commercially available to a large segment of the general public (see pp. ___, supra), _/ prevent their activities from satisfying the statutory criterion of promoting the general welfare and benefiting the community at large. They are accordingly not "charitable" organizations within the meaning of the federal tax laws. Indeed, if Goldsboro's discriminatory practices had been engaged in by a nonsectarian institution with no claim that its racial policies

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_/ Petitioners' broad-based student bodies and petitioner Bob Jones University's recruitment policies make it clear that these "schools are private only in the sense that they are managed by private persons and they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private * * *" Runyon v. McCrary, 427 U.S. 160, 172 n.10 (1976), quoting from (515 F.2d 1082, 1089). Cf. id. at 188 (Powell, J., concurring).

were based on religious doctrine, it is settled that its exclusion of blacks would violate the equal right to contract provisions of Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981, and subject it to a cause of action under that federal statute. Runyon v. McCrary, 427 U.S. 160 (1976). Putting aside petitioner Bob Jones University's similar claim based on religious doctrine, its policy of denying admission to partners in an interracial marriage and of expelling students who date or marry outside their race likewise rests upon an invidious distinction drawn according to race that would violate 42 U.S.C. 1981, and render it liable to a similar suit. Tillman v. Wheaton Haven Recreational Association, 410 U.S. 431 (1973) (white club member has cause of action under 42 U.S.C. 1981 and 1982 for expulsion for bringing black guests); Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975), cert. denied, 422 U.S. 1006 (1976) (white man denied employment because wife was black has cause of action under 42 U.S.C. 1981); Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980) (42 U.S.C. 1981 prohibits commercially operated private sectarian school from expelling a white student because of her association with a black student). Cf. McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641-642 (1950) (rules and regulations applied by a state-supported university that "impair[ed] and inhibit[ed] [a black student's] ability to * * * engage in discussions and exchange views with other students * * * and "depriv[ed] [him] of the opportunity to secure acceptance by his fellow students on his own merits" held to violate right to equal protection). See also Loving v. Virginia, 388 U.S. 1 (1967) (law prohibiting interracial marriage held unconstitutional); McLaughlin v. Florida, 379 U.S. 184

(1964) (law prohibiting interracial [illegible]

unconstitutional). _/

3. In light of the federal statutory prohibitions and public policy against racial discrimination by private schools, the court of appeals correctly held that the Commissioner of Internal Revenue acted within his statutory authority in determining that petitioners did not qualify as tax-exempt organizations under Section 501(c)(3). As we shall show, qualification for tax-exempt status under that Section requires an organization to show that it is "charitable" as that term is understood at common law, i.e. that it benefits the community as a whole. We shall further show that educational institutions such as petitioners that engage in racially discriminatory practices do not so qualifiy, and that petitioners' First Amendment claims do not entitle them to tax-exempt status.

B. Congress intended to limit tax-exempt status under Section 501(c)(3) and eligibility to receive deductible charitable contributions under Section 170 to those organizations that are "charitable" at common law and therefore benefit society as a whole

1. Section 501(c)(3) of the Internal Revenue Code of 1954 (as in effect during the period relevant) exempted from income taxation—

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable,

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_/ Petitioner Bob Jones University's 1975 revision of its admissions and disciplinary rules rendered it no more eligible for the benefits of federal tax exemption. It did not then adopt "a completely open admissions policy * * *," as it asserts (Br. 3, n.2). On the contrary, it continued to deny admission to anyone who was a partner in an interracial marriage, who engaged in interracial dating, or who advocated, or belonged to a group that advocated, interracial dating or marriage (J.A. A53-A54, A208-A209). Accordingly, as the court of appeals correctly pointed out (81-3 Pet. App. A9-A10), petitioner's policy of denying admission to partners in an interracial marriage and of expelling students who date or marry outside of their race rests, as did its prior policies, upon an invidious distinction drawn according to race. See Loving v. Virginia, supra, McLaughlin v. Florida, supra. For present purposes, petitioner Bob Jones University's racial restrictions are therefore comparable to petitioner Goldsboro's absolute ban on the admission of blacks. Thus, the fact of petitioners' racially discriminatory policies is beyond dispute. Cf. Prince Edward School Foundation v. United States, 478 F. Supp. 107 (D.D.C. 1979), aff'd by unpublished order, No. 79-1622 (D.C. Cir. June 30, 1980), cert. denied, 450 U.S. 944 (1981). Moreover, during part of the period in suit (1970-1975), petitioner Bob Jones University denied admission to all blacks, and then to unmarried blacks. See p. ___, supra.

> literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.

Section 170(c)(2) of the Code provides a deduction for income tax purposes for a "charitable contribution" to a "corporation, trust, or community chest, fund, or foundation * * * organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes * * *." See also Section 2055 (estate tax charitable deduction), 2522 (gift tax charitable deduction). Those provisions are construed in pari materia. Bob Jones University v. Simon, supra, 416 U.S. at 727-728 & n.1; Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 29, n.1; (1976).

Since 1970, the Internal Revenue Service has consistently ruled that a private school, "whether church related or not," does not qualify as a tax-exempt organization under Section 501(c)(3), or as an eligible donee of charitable contributions deductible under Section 170(c)(2), unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis (81-3 J.A. A235-A239). _/ The decision to take such a position was made at the highest level of

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_/ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

issued the following statement: "The President approves of and concurs in the IRS decision regarding tax exemption for discriminatory private schools. He believes that ultimately the tax status of racially discriminatory private schools will be determined by the courts and that this is desirable." See Hearings Before the Select Senate Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., Part 3D-Desegregation Under Law, p. 1998 (1970).

As the Commissioner explained in Rev. Rul. 71-447, 1971-2 Cum. Bull. 230, "the statutory requirement of being 'organized and operated exclusively for religious, charitable * * * or educational purposes' was intended to express the basic common law concept" of charity. The primacy of the charitable requirement is further shown "by [Congress'] description in section 170(c) of the Code of a deductible gift to 'a corporation trust, fund, or foundation * * * organized and operated exclusively for * * * educational purposes' as a 'charitable contribution'" (1971-2 Cum. Bull. at 230). Since "all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy * * *" and there is "a national policy to discourage racial discrimination in education, whether public or private * * *," the Ruling holds that "a school not having a racially nondiscriminatory policy as to students is not 'charitable' within the common law concepts reflected in section 170 and 501(c)(3) of the Code * * * and accordingly does not qualify as an organization exempt from Federal income tax" (id. at 230-231). _/

2. The history of the tax exemption provisions supports the Commissioner's ruling position. It shows that in enacting the exemption for charitable organizations, Congress intended to benefit only those organizations whose operations are beneficial to society as a whole, i.e., "charitable," as that term was understood at common law. Section 501(c)(3) has its roots in Section 32, Act of August 27, 1894, 28 Stat. 556, and was carried

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_/ See Restatement, Trusts (Second), Section 377, Comment c (1959): "A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid."

forward, unchanged in substance, into the Corporation Excise Tax Act of Aug. 5, 1909, 36 Stat. 113, Section 38. _/ In its initial version, the statute exempted from tax "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes * * *." That enumeration was in accord with Lord MacNaughten's authoritative collation of common law charities in Commissioners for Special Purpose of Income Tax v. Pemsel [1891] A.C. 531, 583 (quoted in Evans v. Newton, 382 U.S. 296, 307-308 (1966) (White, J., concurring)):

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

See also Jackson v. Phillips, 14 Allen (96 Mass.) 539, 556 (1867); IV Scott, The Law of Trusts (1967 ed.), Section 368. _/ Thus, the term "charitable" is used "in its generally accepted legal sense" (Treasury Regulations, Section 1.501(c)(3)-1(d)(2)), and not in the popular sense such as benevolence to the

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_/ Earlier income taxes were originally imposed only upon individuals, Section 49, Act of Aug. 5, 1861, 12 Stat. 292, 309, and subsequently only upon individuals and certain specified corporations, Sections 116, 120-122, Act of June 30, 1864, 13 Stat. 218, 281, 283-285. Cf. Paul, Taxation in the United States 9-15 (1954). See Collector v. Hubbard, 12 Wall. 1 (1870).

_/ The terms of the exemption have been continued without basic change in all subsequent income tax acts. The first modern income tax statute, Act of Oct. 3, 1913, c. 16, 38 Stat. 114, Section II(G)(a), contained an exemption in favor of "any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes * * *." The Revenue Acts of 1916 and 1918 carried forward that exemption in identical terms. Section 11(a), Act of Sept. 8, 1916, 39 Stat. 756, Section 231(6), Revenue Act of 1918, 40 Stat. 1057. By Section 231 of the Revenue Act of 1921, 42 Stat. 227, Congress added to the statute the word "literary" and the phrase "or for the prevention of cruelty to children or animals." The phrase "testing for public safety" was inserted in 1954. And the Revenue Act of 1934, ch. 277, 48 Stat. 680, added the qualification that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation."

The income deduction for charitable contributions originated in Section 1201(2), Act of Oct. 3, 1917, 40 Stat. 300. See Helvering v. Bliss, 293 U.S. 144, 147 (1943). It has been continued in each subsequent revenue enactment. See Reiling, Federal Taxation: What is a Charitable Organization?, 44 A.B.A.J. 525, (1958).

poor. *Green* v. *Connally*, *supra*, 330 F. Supp. at 1157; *accord*, *Eastern Kentucky Welfare Rights Org* v. *Simon*, 506 F.2d 1278, 1286-1290 (D.C. Cir. 1974), vacated and remanded on other grounds, 426 U.S. 26 (1976), see Reiling, *Federal Taxation: What is a Charitable Organization*, 44 A.B.A.J. 525, 527 (1958); cf. 4 Report of the Royal Commissioners on Taxation [Canada], p. 132 (1967).

The legislative history of the tax exemption provisions also indicates that Congress intended to limit their application to those organizations that further the traditional charitable objects of society as a whole and thereby diminish the burdens of government. As the sponsor of the 1909 tax exemption statute observed, the provision was designed to relieve from the corporate tax those institutions "devoted exclusively to the relief of suffering, to the alleviation of our people, *and to all things which commend themselves to every charitable and just impulse*" (emphasis supplied). 44 Cong. Rec. 4150 (1909). Similarly, when Congress amended the provision for charitable deductions to confine its application to gifts made to domestic institutions (by Section 23(o), Revenue Act of 1938, ch. 289, 52 Stat. 447), the accompanying House Committee Report (H.R. Rep. No. 1860) 75th Cong., 3d Sess. 19 (1938), explained:

> The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare. The United States derives no such benefits from gifts to foreign institutions, and the proposed limitation is consistent with the above theory.

3. The decisions of this Court confirm the primacy of the "charitable" requirement under Section 501(c)(3). In *Helvering* v. *Bliss*, 293 U.S. 144, 147 (1934), the Court emphasized the

"charitable" requirement by observing that "Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income * * *" (emphasis supplied). Thus, the fact that the statute speaks of "corporations * * * organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes" does not, as petitioners would have it, mean that each one of those terms describes a mutually exclusive tax-exempt category. Instead, an organization is eligible for tax-exempt status under Section 501(c)(3) only if its operations are "charitable," i.e., of benefit to society as a whole. See Trinidad v. Sagrada Orden, 263 U.S. 578, 581 (1924) ("* * * [e]vidently the exemption [was] made in recognition of the benefit which the public derives from corporate activities of the class named, and [was] intended to aid them when not conducted for private gain." Accord, St. Louis Union Trust Company v. United States, 374 F.2d 427, 432 (8th Cir. 1967). Otherwise, a school organized to train political assassins or terrorists or to teach genocide, an organization practicing a religion devoted to the illegal shipment of arms or practicing sacraments that constitute crimes such as human sacrifice, or a scientific organization devoted to the development and distribution of illegal drugs, each would be exempt from tax and eligible for deductible charitable contributions as respectively "educational," "religious," or "scientific" organizations. Congress surely never intended the government thus to provide indirect financial support for criminal activities or for organizations whose aims are contrary to clearly established public policy.

_/ As the three judge district court in Green v. Connally, supra, 330 F. Supp. at 1160, put it: "This public policy doctrine operates as a necessary exception to or qualifier of the precept that in general trusts for education are considered to be for the benefit of the community. Otherwise, for example, Fagin's school for pickpockets would qualify for a charitable trust."

The courts of appeals have similarly viewed the tax exemption provisions as reflective of the common law of charitable trusts. See United States v. Proprietors of Social Law Library, 102 F.2d 481, 483 (1st Cir. 1939) ("[t]he term 'charitable' is a generic term and includes literary, religious, scientific and educational institutions"); Pennsylvania Co. for Insurance on Lives v. Helvering, 66 F.2d 284, 285 (D.C. Cir. 1933) ("we must look to established [trust] law to determine the meaning of the word charitable.'"). Cf. International Reform Federation v. District Unemployment Board, 131 F.2d 337 (D.C. Cir. 1942). _/

Finally, as the court below in Bob Jones University pointed out (No. 81-3 - Pet. App. A7-A8, n.6), the structure of the statutory framework itself supports the correctness of the Commissioner's ruling position that an organization seeking tax-exempt status under Section 501(c)(3) must show that it is "charitable," whatever the particular nature of its activities (educational, religious, scientific, etc.) might be. Thus, Section 170(a) and (c), the companion provision that confers an income tax deduction to donors to Section 501(c)(3) organizations, characterizes the deduction as for a "charitable contribution." Indeed, the language of Section 170(c)(2)(B), which defines in part the type of organization eligible for gifts of deductible "charitable contributions," tracks almost verbatim

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_/ In International Reform Federation, the District of Columbia Circuit stated (131 F.2d at 339):

> That Congress had in mind these broader definitions is confirmed by the words used in the [District of Columbia Code] for by its terms it embraces religious, charitable, scientific, literary, or educational corporations, thus including within the exemption clause every nonprofit organization designed and operating for the benefit and enlightenment of the community, the State, or the Nation--in short, to apply the exemption to those organizations commonly designated charitable in the law of trusts.

the text of Section 501(c)(3). In these circumstances, it is plain that the "charitable" requirement is the threshold test for qualification for tax exemption under Section 501(c)(3) and eligibility for deductible contributions under Section 170. _/

C. A private school that practices racial discrimination does not qualify for tax exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170 because it is not organized and operated for "charitable" purposes as that term is understood at common law

1. As we have shown (supra, pp.   ), Congress intended that an organization seeking tax-exempt status under Section 501(c)(3) and eligibility for deductible charitable contributions must be "charitable" in the broad common law sense of that term, i.e., it must benefit society as a whole. The court below correctly concluded that a private school, otherwise open to a large segment of the general public, that maintains a racially discriminatory admissions policy or other racially restrictive practices, is not beneficial to the community at large and is therefore not "charitable" as that term is understood at common law.

This proposition follows from the fundamental principle of the law of trusts that all charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. Ould v. Washington Hospital for Foundlings, supra, 95 U.S. 303; Restatement, Trusts (Second), Section 377, Comment c (1959).

_/ See also Sections 945(b)(2), 556(b)(2), 873(b)(2), 882(c)(1)(B), all of which use the term "charitable contribution." Section 642(c) confers a deduction to an estate or trust for "Amounts Paid or Permanently Set Aside for a Charitable Purpose." Cf. Sections 501(h) and 4911, which impose a tax on the lobbying expenditures of certain "public charities," and which place under that heading educational institutions, hospitals, and medical research organizations, among other organizations described in Section 501(c)(3).

Accordingly, the development of a clearly articulated public policy against racial discrimination in education has led to a corresponding change in the law governing enforcement of racially restrict provisions in educational trusts. After reviewing the common law decisions dealing with trusts established for the purpose of providing for racially discriminatory private education, the three-judge district court in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), concluded that "The cases indicate a trend that racially discriminatory institutions may not validly be established or maintained even under the common law pertaining to educational charities (footnote omitted)" (id. at 1160). Thus, the district court in Green pointed out that numerous decisions have thwarted enforcement of racially discriminatory bequests in private education by removing racial restrictions from trust instruments under the cy pres doctrine. See, e.g., Bank of Delaware v. Buckson, 255 A.2d 710, 717 (Del. Ch. 1969) (scholarships); Dunbar v. Board of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969) (orphanage); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969) (trust for aged "white men"); cf. Coffee v. William Marsh Rice University, 408 S.W.2d 269 (Tex. Civ. App. 1966) (nullifying racial restrictions in university charter). See also Howard Savings Institution v. Peep, 34 N.J. 494, 170 A.2d 39 (1961); In re Estate of Hawley, 32 Misc. 2d 624, 223 N.Y.S. 2d 803 (1961).

In these circumstances, it was well within the statutory authority of the Commissioner of Internal Revenue to conclude that a private school that practices racial discrimination either in its admissions policy or in its other governing rules cannot qualify for tax exempt status under Section 501(c)(3). Tax exemption under Section 501(c)(3) requires organization and operation for "charitable" purposes as that term is understood at common law. Thus, once the common law courts developed a body of decisional law that refused to enforce racially discriminatory bequests and trusts in the context of private education, the Commissioner of Internal Revenue had ample legal basis to exercise his authority to "prescribe all needful rules and regulations" (26 U.S.C. 7805(a)) to rule that racially discriminatory private schools were not tax-exempt under Section 501(c)(3).

Indeed, the Commissioner's ruling in 1970 was presaged by the 1959 revision (24 Fed. Reg. 5217,5219) of the Treasury Regulations under Section 501(c)(3). In promulgating Section 1.501(c)(3)-1(d)(2) of those Regulations, pursuant to its authority to "prescribe all needful rules and regulations" (26 U.S.C. 7805(a)), the Treasury recognized that the term "charitable" is "'so general * * * as to render an interpretative regulation appropriate.'" National Muffler Dealers Assn. v. United States, 440 U.S. 472, 476 (1979), quoting Helvering v. Reynolds Co., 306 U.S. 110, 114 (1939). See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 29 (1976). Thus, the Regulations provide in pertinent part:

> (2) Charitable defined. The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works, lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. * * *

Hence, since at least 1959, the Treasury has explicitly reaffirmed Congress' intention to confer tax-exempt status under Section 501(c)(3) on those organizations that are "charitable" in the common law sense of that term. _/ This construction of the statute has resulted in a series of published rulings that have relied upon the law of charitable trusts in determining whether an organization is exempt from tax and eligible for deductible charitable contributions under Sections 501(c)(3) and

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_/ Petitioners point out (81-1 Br. 20-25; 81-3 Br. 14-16) that in prior Regulations under Section 501(c)(3) and its predecessors, and in certain rulings, no longer followed, the Internal Revenue Service took the position that "[c]orporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor." Treasury Regulations 118, Section 39.101(6)-1(b) (1939 Code). See I.T. 1800, II-2 Cum. Bull. 152 (1923), declared obsolete by Rev. Rul. 69-43, 1969-1 Cum. Bull. 310; I.T. 1827, II-2 Cum. Bull. 154, declared obsolete by Rev. Rul. 69-43, *supra*. But cf. Sol. Op. 159, III-I Cum. Bull. 480 (1924), allowing a charitable contribution deduction for a bequest for the construction of a community auditorium, on the basis that Congress "intended that [the term 'charity'] should cover all bequests as might properly be classified as charitable at common law."

The authoritative force of the outstanding Regulation is not undermined by the fact that it represents a change from its predecessors. The outstanding Regulation "'implement[s] the congressional mandate in some reasonable manner' * * *." Hence, its construction of the generalized term "charity" must be sustained. *National Muffler Dealers Assn.* v. *United States*, 440 U.S. 472, 476, 488 (1979) (quoting *United States* v. *Cartwright*, 411 U.S. 546, 550 (1973), quoting *United States* v. *Correll*, 389 U.S. 299, 307 (1967)). This Court has repeatedly confirmed the Treasury's right to change its Regulations and rulings and correct its position in light of its administrative experience. *Morrissey* v. *Commissioner*, 296 U.S. 344, 354-355 (1935); *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 99-103 (1939); *Helvering* v. *Reynolds*, 313 US. 428, 431-433 (1941); *Commissioner* v. *P.G. Lake, Inc.*, 356 U.S 260, 265-266, n.5 (1958); *National Muffler Dealers Assn.* v. *United States*, 440 U.S. 472, 485-486 (1979); *Dixon* v. *United States*, 381 U.S. 68, 73-76 (1965); *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 184-186 (1957).

170(c)(2). _/ Given the substantial body of decisional law rejecting the enforcement of racial restrictions in bequests or trusts and the Treasury's implementation of those principles in construing the federal tax exemption provisions, it cannot be said that no "'fair warning'" has been given "of the bounds of 'Federal public policy'" (No. 81-3 Br. 34).

2. The Commissioner's ruling finds further support in the statutory right of "[a]ll persons within the jurisdiction of the United States * * * [to] have the same right * * * to make and enforce contracts * * * as is enjoyed by white citizens * * *.". Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. 1981. In *Runyon* v. *McCrary*, 427 U.S. 160 (1976), this Court held that Section 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are blacks. As the Court there concluded (*id.* at 172-173), "It is apparent that the racial exclusion practiced by the [schools] amounts to a classic violation of §1981. The parents * * * sought to enter into contractual relationships.

_/ See, *e.g.*, Rev. Rul. 71-447, *supra*; Rev. Rul. 67-325, 1967-2 Cum. Bull. 113 (organization providing free recreational facilities restricted to less than the entire community on the basis of race is not entitled to Section 501(c)(3) exemption or eligible for deductible charitable contributions); Rev. Rul. 69-545, 1969-2 Cum. Bull. 117 (organization providing hospital care on a nonprofit basis for members of its community furthers purpose considered charitable in the generally accepted legal sense and therefore is eligible for Section 501(c)(3) exemption; see *Simon* v. *Eastern Kentucky Welfare Rights Org.*, *supra*, 426 U.S. 26); Rev. Rul. 76-442, 1976-2 Cum. Bull. 148 (organization providing free tax and estate planning services to encourage donations to charitable organizations is not engaged in a charitable activity in the generally accepted legal sense and therefore is not entitled to Section 501(c)(3) exemption). See also Rev. Rul. 78-68, 1968-1 Cum. Bull. 149 (organization designed to participate in implementing the Demonstration Cities in Metropolitan Development Act of 1966, 42 U.S.C. 3301, *et seq.*, was exempt); *Professional Standard Review* v. *Commissioner*, 74 T.C. 240 (1980) (organization which promoted implementation of Social Security Amendments of 1972, 86 Stat. 1430, Sections 249F(b), was exempt); Rev. Rul. 77-69, 1977-1 Cum. Bull. 143 (organization which assisted in implementing the National Health Planning and Resources Development Act of 1974, P.L. 93-641, 88 Stat. 2225, was exempt).

* * * for educational services * * *. * * *' But neither school offered services on an equal basis to white and nonwhite students. * * * The * * * conclusion that §1981 was thereby violated follows inexorably from the language of that statute as construed in Jones [v. Alfred H. Mayer Co., 392 U.S. 409 (1968)], Tillman [v. Wheaton-Haven Recreation Assn., 410 U.S. 431 (1973)], and Johnson [v. Railway Express Agency, 421 U.S. 454 (1975)]." In so holding, the Court rejected the schools' contention that Section 1981, as so applied, violates constitutionally protected rights of free association and privacy, or a parent's right to direct the education of his children (id. at 175-179).

Putting aside petitioners' claims that their racial policies were based on religious doctrine, _/ it seems clear that 42

_/ We discuss petitioners' First Amendment claims at pages ____, *infra*.

To be sure, the Court pointed out in *Runyon* that the case did not "present the application of §1981 to private sectarian schools that practice *racial* exclusion on religious grounds" (emphasis in original; footnote omitted) (427 U.S. at 167). However, the Court in *Runyon* did reject a comparable First Amendment claim based upon freedom of association. As the Court there stated (427 U.S. at 176; emphasis in original):

> * * * [I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood* v. *Harrison*, 413 U.S. 455, "the Constitution * * * places no value on discrimination," *id.* at 469, and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment * * * it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." *Id.* at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."

For similar reasons, while a religiously oriented private school may have a right to espouse racial segregation in its teaching, it has no right to hold itself open to the public on a racially discriminatory basis—any more than a religious group would have a First Amendment right to purchase an apartment development and rent it to the public on a racially discriminatory basis or to purchase a factory or department store and employ whites only. (Similarly, an individual employer would not, for example, have a First Amendment immunity from the National Labor Relations Act if he sincerely believed that he had a religious duty to deal with his employees directly rather than through union intermediaries.) Such commercial practices are far removed from such questions as the right to control employment policies within a church itself or admissions practices in seminaries and other non-public religious educational institutions. See generally *Fiedler* v. *Marumsco Christian School*, 631 F.2d 1144, 1150-1151 (4th Cir. 1980); *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 312 (plurality opinion), 326 (Roney, J., dissenting) (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).

U.S.C. 1981, as construed by Runyon, makes illegal their racially discriminatory practices and subjects them to damage suits by parties injured by such practices. _/ And surely petitioners' violation of 42 U.S.C. 1981 is relevant in any determination whether they are "charitable" for purposes of tax exemption under Section 501(c)(3) and eligibility for deductible charitable contributions under Section 170(c). An educational institution that maintains racially discriminatory admissions policies prohibited by federal civil rights statutes cannot be deemed to benefit society as a whole and is therefore not "charitable" under the Internal Revenue Code. Accordingly, Bob Jones University's claim (Br. 20 n. 19; 29) that it has not been charged with violation of any federal statute does not mitigate the illegality of its conduct under Section 1981. Rather, it simply reflects the fortuity that none of its applicants excluded on racial grounds (see J.A. A89-A90), nor any student expelled for participation in, or advocacy of, an interracial association (see 81-3 Pet. App. A4), has brought suit under Section 1981. See Fiedler v. Marumsco Christian School, 631 F.2d 1144, 1150-1151 (4th Cir. 1980); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 321-324 (5th Cir. 1977) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978).

3. In our view, the decisions rejecting petitioners' racially restrictive practices as the proper subject of a charitable educational trust, the incompatibility of those practices with the highly articulated public policy against racial discrimination in education, and the illegality of such policies under Section 1981, offer sufficient justification for the Commissioner's ruling that such practices are incompatible with tax exempt status and eligibility for deductible charitable contributions. But the fact that tax exemption and eligibility for deductible charitable contributions represent a form of

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_/ Petitioner Bob Jones University's brief conspicuously avoids any reference to Runyon, despite the court of appeals' reliance on it (81-3 Pet. App. A9).

indirect government subsidy of an educational institution is a further consideration in support of the decision below.

In Brown v. Board of Education, 347 U.S. 483 (1954), and Bolling v. Sharpe, 347 U.S. 497 (1954), this Court proclaimed that the maintenance of a racially segregated school system by a state or federal authority abridges the constitutional right of black school children to the equal protection of the laws. Although Brown and Bolling involved segregated public education, their equal protection rationale prohibits governmental aid to racially restricted private education. Thus, the Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools. See cases cited in Norwood v. Harrison, 413 U.S. 455, 463 n.6 (1973). There, the Court struck down a state program under which students borrowed textbooks without regard to whether the students attended private schools with racially discriminatory policies. As the Court stated in Norwood (413 U.S. at 465), "Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish' Lee v. Macon County Board of Education, 267 F. Supp. 458, 475-476 (M.D. Ala. 1967)." See also Griffin v. County School Board, 377 U.S. 218 (1964).

Here, it is beyond question that the federal government could not promote petitioners' admittedly discriminatory policies by providing direct financial aid to petitioners. But, as we have pointed out (supra, p.), federal tax exempt status and eligibility for deductible charitable contributions represent significant indirect material aid in the form of matching grants. Petitioners dispute the effect of a tax exemption and claim (No. 81-1 Br. 42) that it "'constitute[s] mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy'" Walz v. Tax Commission, 397 U.S. 664, 691 (1970) (Brennan, J., concurring)." See also id. at 676. These cases, however, do not simply involve passive tax exemptions of the type involved in Walz, in which the government arguably withdraws from the affairs of the affected institutions. As the three-judge district court correctly observed in Green v. Kennedy, 309 F. Supp. 1127, 1134 (D.D.C. 1970), "The support which is significant in the context of this controversy is not the exemption of the schools from taxes laid on their income, but rather the deductions from income tax available to the individual, and corporations, making contributions supporting the school." See also 81-3 Pet. App. A10-A11 n.7.

While we do not suggest that such indirect aid is, in all circumstances, constitutionally equivalent to the direct state aid that both the Constitution and federal statutes _/ prohibit, _/ the Commissioner of Internal Revenue could well have concluded that prohibiting tax exemptions and eligibility for deductible charitable contributions for racially discriminatory private schools would avoid constitutional problems. As Commissioner of Internal Revenue Randolph W. Thrower explained, "President Nixon endorsed the IRS position after it became increasingly clear that there are serious legal and constitutional implications in the Government's allowing tax exemption and the deduction of contributions for such private schools." IRS Press Release, July 22, 1970, Hearings, supra, pp. 2005-2006. In

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_/ See Sections 401(c) and 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000c, 2000d. These statutes respectively call upon the government to terminate segregation in private schools "operated * * * predominantly from or through the use of governmental funds or property" and prohibit racial discrimination in "any program or activity receiving Federal financial assistance." By its terms, Section 601 does not prohibit the indirect assistance provided by tax-exempt status and eligibility for deductible charitable contributions. Otherwise, there would have been no need for the statute to require the identification of the particular program or activity receiving federal financial assistance.

_/ To the contrary, the Commissioner has always regarded the statutory provisions authorizing the deduction of charitable contributions to be validly applicable to private contributions to churches, even though direct grants of governmental funds to churches presumably would violate the Establishment Clause. See note , supra.

short, while the Commissioner's ruling position may not be constitutionally compelled, it forecloses the constitutional challenge that would occur had he not so ruled. _/ Surely the Commissioner's statutory authority to promulgate "all needful rules and regulations" (26 U.S.C. 7805(a)) under the internal revenue laws encompasses the power to construe the Internal Revenue Code in a manner that will insure that the government will not "induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish" (*Lee* v. *Macon County Board of Education*, *supra*, 267 F. Supp. at 475-476).

4. Furthermore, as the court below pointed out (No. 81-3 Pet. App. A8), the Commissioner's ruling is buttressed by the well-settled rule that federal tax benefits are generally not allowable if they would frustrate public policy. In *Textile Mills Corp*. v. *Commissioner*, 314 U.S. 326 (1941), the Court upheld a Treasury Regulation pursuant to which the Commissioner had denied business deductions claimed by a corporation for sums expended to "promot[e] legislation" (*id*. at 336-338). Rejecting the argument that "the administrative agency usurped the legislative function * * *," the Court pointed out that "[c]ontracts to spread such insidious influences through legislative halls have long been condemned." It concluded (*id*. at 338-339), "[t]here is no reason why, in the absence of clear congressional action to the contrary, the rulemaking authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family

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_/ Indeed, the Commissioner's ruling was issued after adopting the plaintiffs' position in the midst of the *Green* litigation. See p. , n. , *supra*. The three-judge district court in that case likewise observed that "[w]e are fortified in our view of the correctness of the IRS construction by the consideration that a contrary interpretation of the tax laws would raise serious constitutional questions * * *" (330 F. Supp. at 1164).

of contracts to which the law has given no sanction." See also Cammarano v. United States, 358 U.S. 498, 511-513 (1959); Slee v. Commissioner, 42 F.2d 184 (2d Cir. 1930).

Similarly, in Tank Truck Rentals v. Commissioner, 356 U.S. 30, 33-34 (1958), the Court held that fines paid for violations of state highway weight limits were not deductible as "ordinary and necessary" business expenses. "A finding of 'necessity' cannot be made," the Court ruled, "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." Accord: Hoover Express Co. v. United States, 356 U.S. 38 (1958); McDonald v. Commissioner, 323 U.S. 57 (1944); cf. Commissioner v. Heininger, 320 U.S. 467, 473-475 (1943); Commissioner v. Sullivan, 356 U.S. 27 (1958); see Mazzei v. Commissioner, 61 T.C. 497 (1974); Turnipseed v. Commissioner, 27 T.C. 758 (1957). _/

The rationale of the Tank Truck Rentals decision is equally applicable here. Just as the Court refused to permit a tax deduction for a fine because the deduction would lessen the economic impact of the fine and thereby "frustrate sharply defined national or state policies proscribing particular types of conduct," here, too, allowance of tax exemptions and eligibility for deductible charitable contributions for racially restrictive private schools such as petitioners would frustrate the national policy against support for racial segregation of schools, public or private. Since the purpose of the tax exemption provisions for charitable organizations is to aid those institutions that are "charitable" (in the common law sense) and

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_/ In the Tax Reform Act of 1969, Congress codified the public policy doctrine in the business expense area by adding Sections 162(c), (f), and (g) to the Code. These provisions deny deductions for bribes paid to public officials (whether or not foreign officials), and other unlawful bribes or "kickbacks." See S. Rep. No. 91-552, 91st Cong. 1st Sess., pp. 273-274 (1969).

serve society as a whole, the national policy against segregated education forecloses petitioners' eligibility for these benefits.

Contrary to Bob Jones University's assertion (Br. 20), the Commissioner's position based upon the Green rationale does not put in jeopardy the Section 501(c)(3) tax exemption of organizations that "discriminate on account of age, maintain unsafe or unhealthful working conditions, create any financial barrier to education, based on sex, or create any environmental disharmony * * *". Nor does it suggest that "violation by a 501(c)(3) organization of zoning laws, building codes and myriad other state proscriptive laws would necessitate revocation of federal tax exemption" (ibid.; footnote omitted). The mere fact that a charitable organization may have violated a particular law does not mean that it has lost its charitable character—and Congress certainly has not charged the Commissioner with monitoring such organizations for all possible legal infractions. _/ Of the foregoing examples, the only one that presents a question at all comparable to the present one would be a policy of sex discrimination. The Commissioner, however, has not sought, and does not intend to seek, to extend his ruling to sex discrimination, as to which both constitutional _/ and federal statutory proscriptions are far less pervasive than they

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_/ Indeed, even an isolated instance of racial discrimination, contrary to a school's general policies, would not, in our view, result in loss of tax-exempt status.

_/ This Court has repeatedly rejected the proposition that classifications based on sex are subject to the same standard of strict scrutiny applicable to racial classifications.

are with respect to race discrimination. _/ The issue here is limited to whether petitioners' racially discriminatory policies prevent them from qualifying as tax-exempt "charitable" organizations under Section 501(c)(3) of the Internal Revenue Code.

D. Congress has repeatedly considered the Commissioner's statutory interpretation that racially discriminatory private schools are not tax exempt and has refused to alter it and, indeed, has made other statutory changes

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_/ For example, 42 U.S.C. 1981 comprehensively prohibits the abridgment of the right of contract on account of race (see pages , supra), but there is no similar federal statutory provision prohibiting sex discrimination.

Moreover, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which otherwise prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, contains an exception for employment of members of a particular religion, sex, or national origin, "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *" (42 U.S.C. 2000e-2(e)). There is, however, no similar exception with respect to race.

Similarly, there are a number of exceptions applicable to the federal prohibitions against sex discrimination in education set forth in Title IX of the Civil Rights Act of 1964. The federal statute bars sex discrimination in any "education program or activity receiving Federal financial assistance" (20 U.S.C. 1681(a)). But it applies in regard to admissions "only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education" (20 U.S.C. 1681(a)(1)). There are other exceptions from the prohibition of sex discrimination for educational institutions of religious organizations with contrary religious tenets (20 U.S.C. 1681(a)(3)), educational institutions training individuals for the military (20 U.S.C. 1681(a)(4)), and for "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex" (20 U.S.C. 1681(a)(5)). There are, again, however, no comparable exceptions in Title VI of the 1964 Act prohibiting racial discrimination.

Finally, in Griffin v. Breckenridge, 403 U.S. 88 (1971), this Court ruled that Section 2 of the Civil Rights Act of 1871, 42 U.S.C. 1985(c), provides a cause of action for damages caused by private conspiracies arising in a context of racial discrimination. However, the Court has also held that the same statute may not be invoked in a case involving a claim of discriminatory employment practices on the basis of sex. Great American Fed. S. & L. Assn. v. Novotny, 442 U.S. 366 (1979).

premised on the validity of that
interpretation

Since the Commissioner announced his statutory interpretation that racially discriminatory private schools are not tax exempt, Congress has been fully aware of the Service's position, has repeatedly considered the propriety of his ruling, and has refused to alter it. Indeed, as we shall show, to the extent Congress has acted in this area, it has extended the non-discrimination principle to the tax-exempt status of private social clubs, and modified the procedures that the Service employs for testing the bona fides of the racial policies of private schools — basing both actions on the premise that the Commissioner's interpretation was correct. After carefully considering the question on several occasions, however, Congress has rejected several attempts to set aside the Service's substantive legal position that petitioners seek to challenge. In these circumstances, judicial deference to the agency's interpretation of a statute is especially appropriate "'when Congress has refused to alter the administrative construction' * * * [and] that construction accords with well-established congressional goals." Board of Governors of the Federal Reserve System v. First Lincolnwood Corp., 439 U.S. 234, 248, 251 (1978), quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation * * *, then presumably the legislative intent has been correctly discerned." United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979), quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940).

1. The chronology of Congress' continuing attention in this area necessarily begins with the Treasury's 1959 modification of the Regulations under Section 501(c)(3). As we have pointed out

(supra, p.), the modification to Section 1.501(c)(3)-(d)(2) of the Regulations established the primacy of the "charitable" requirement by providing that the term "charitable" is used "in its generally accepted legal sense and is, therefore not to be construed or limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes * * *." This Regulation was extant during Congress' comprehensive review of the tax-exempt area in the Tax Reform Act of 1969, in which the tax on the activities of certain private foundations was added to the Code. See, e.g., Sections 508, 509, 4940 et seq. Moreover, in 1976, Congress specifically amended Section 501(c)(3) to confer tax-exempt status upon organizations to foster national or international sports competition. See Pub. L. 94-455, Section 1313(a), Stat. . Significantly, Congress did not disapprove the Secretary's interpretation at the time of these subsequent legislative changes. The Regulations are therefore an authoritative interpretation as to which Congress is deemed to have given its approval. See, e.g., Helvering v. Winmill, 305 U.S. 79, 82-83 (1938); Lykes v. United States, 343 U.S. 118, 127 (1952); Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

Congress further considered the matter shortly after the Commissioner announced his position with respect to racially discriminatory schools on July 10, 1970. One month later, Commissioner Thrower testified before the Senate Select Committee on Equal Educational Opportunity in order to explain the Service's policy, the standard that was to be applied, and the modes of enforcement. During the hearings, Senator Mondale, the Chairman of the Committee, pressed Commissioner Thrower not to accept a private school's assurance of a non-discriminatory admissions policy but to monitor attendance records. See Hearings, supra, pp. 1992-2028. In response, the Commissioner promised that the Service would investigate schools that do not follow a declared nondiscriminatory admissions policy and would take appropriate action. Id. at 2028.

In 1976, Congress extended the nondiscrimination principle to the tax-exempt status of private social clubs. By the Act of Oct. 20, 1976, Pub. L. No. 94-658, Section 2(a), 90 Stat. 2697, Congress added to the Code, "in view of national policy," _/ the provision now contained in Section 501(i), which explicitly denies exempt status to a social club if its charter or any of its written policy statements provides for "discrimination against any person on the basis of race, color, or religion." This provision was added in direct response to a ruling by a three-judge court in McGlotten v. Connally, 338 F. Supp. 448, 457-459, 462 (D.D.C. 1972), that recognition of racially segregated social clubs as tax-exempt entities under Section 501(c)(7) did not violate the Code, the Constitution, or Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. The accompanying committee reports in both Houses _/ reflect Congress' intent to apply to social clubs the same antidiscrimination rule involved here. Indeed, both Reports (in footnote 5 of each) cite with approval the three-judge district court's decision in Green v. Connally, supra, and this Court's affirmance of it, for the proposition "that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2))." _/ Congress

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_/ S. Rep. No. 94-1318, 94th Cong., 2d Sess. (1976).

_/ Id. at 7-8 & n.5; H. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 & n.5 (1976).

_/ Petitioner Bob Jones University (Br. 16 n.15) argues that the "mere reference [to Green] is not remotely an endorsement of Green's construction of §501(c)(3)." But the pertinent Committee Reports cited and described the holding in Green in order to assimilate Congress' application of the nondiscrimination principle to social clubs to the court's ruling with respect to private schools. Even if it is assumed that the affirmance of Green by this Court "lacks the precedential weight of a case involving a truly adversary controversy" (Bob Jones University v. Simon, 416 U.S. at 740 n.11), that would not detract from the force of the three-judge district court's opinion in Green and the House and Senate Reports' citation of it as a proper foundation for Congress's enactment of Section 501(i). Moreover, the appeal to this Court in Green was by intervenors opposed to the district court's judgment and thus to the position of the plaintiffs (see the government's Motion to Dismiss, No. 71-425, pages 2-5), and the Court chose to affirm the judgment rather than grant the government's Motion to Dismiss. 404 U.S. 997. See the discussion of the procedural history of Green in this Court in the Brief Amicus Curiae of the N.A.A.C.P. Legal Defense and Education Fund, Inc., at pp. 11-12 n.10.

therefore continued to be well aware of the Service's policy implemented six years earlier that discrimination on account of race is inconsistent with an educational institution's tax-exempt status under Section 501(c)(3) and also with its status as a donee of deductible charitable contributions under Section 170(c)(2) — and specifically premised a legislative extension of that policy on the policy's validity as a correct interpretation of the statute. _/ There is accordingly no basis for petitioner Bob Jones University's claim (Br. 22) that "The Green opinion calls for a plain usurpation of Congressional law making powers by the non-elected public servants of the Internal Revenue Service." _/

_/ In 1980, Congress again amended Section 501(i) to provide that the prohibition against discrimination by social clubs on religious grounds shall not apply to an auxiliary of a fraternal beneficiary society which "limits its membership to the members of a particular religion" or "a club which in good faith limits its membership to the members of a particular religion in order to further the ~~leadings~~ teachings or principles of that religion, and not to exclude individuals of a particular race or color." The legislative history indicates that Congress intended to benefit religious organizations such as the Knights of Columbus and Catholic Alumni Clubs. See H. Rep. No. 96-545, 96th Cong., 1st Sess., p. 21 (1980); S. Rep. No. 96-103, 96th Cong., 2d Sess., pp. 9-10 (1980); Hearings Before the Subcommittee on Taxation and Debt Management of the Senate Committee on Finance, 96th Cong., 2d Sess., pp. 329 et seq. (1980). Although the House version of the bill would have simply exempted social clubs which limited their membership to the members of a particular religion, the Senate version, which was enacted, reflects Congress' intent to affirm once again the nondiscrimination principle as to race. Thus, the Senate Committee Report (S. Rep. No. 96-103, supra, p. 10) states:

> Such [alumni] clubs will continue to be eligible for exemption provided the religious limitation on membership is designed in good faith, to further the teachings or principles of that religion, and not for the purpose of excluding individuals of a particular race or color. The provision is intended to benefit Catholic Alumni Clubs, but it is not intended to authorize discrimination on the basis of race under the guise of religious affiliation.

~~S. Rep. No. 96-103, supra,~~

_/ Moreover, as we have pointed out (supra, p.), the President himself concurred in and approved the Service's ruling position at the time of its announcement.

3. Finally, the more recent enactment by Congress of the Ashbrook Amendment (Section 103) and Dornan Amendment (Section 615) to the Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, 93 Stat. 559, further strengthens the case for congressional acquiescence in the Service's substantive legal position that racially discriminatory private schools are not entitled to tax exempt status. We have described the nature of this legislative oversight in greater detail in our petition for certiorari in Regan v. Wright, No. 81-970, pp. 20-23, and refer the Court to that discussion. _/ By its terms, the Ashbrook Amendment prohibits the Internal Revenue Service from using any funds appropriated to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious, or church operated schools under section 501(c)(3) * * * unless in effect prior to August 22, 1978." The Dornan Amendment prohibits the funding of two proposed revenue procedures announced in 1978 and 1979. _/ Hence, as the court of appeals correctly pointed out (81-3 Pet. App. A5-A6, n.3), the Ashbrook and Dornan Amendments are, of course, prospective in operation

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_/ We are serving a copy of our petition in Regan v. Wright upon petitioners in these cases.

_/ The Internal Revenue Service proposals of 1978 and 1979 were designed to supplement its existing procedures for verifying whether the actual practices of certain schools conformed to their certifications of nondiscrimination. Those proposals provoked a large volume of adverse testimony before Congress. See Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 96th Cong., 1st Sess. (1979). In Section 615 (93 Stat. 577) of the Treasury, Postal Service, and General Government Appropriations Act, supra, Congress stipulated that none of the funds made available by the Act be used to carry out the proposed revenue procedures of 1978 and 1979. In Section 103 (93 Stat. 562) of the same Act, Congress provided that none of the funds made available by the Act be used "to formulate or carry out any * * * procedure, guideline * * * or measure which would cause the loss of tax-exempt status to private, religious, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

and do not apply to the substantive or procedural policies enforced in these cases. See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587. The object of the Amendments, as petitioner Goldsboro Christian Schools concedes (81-1 Br. 28, n.13), was to "maintain the status quo" by temporarily barring the employment of proposed new procedures to enforce the policy of the Internal Revenue Service. See 43 Fed. Reg. 37296-37298 (Aug. 22, 1978); 44 Fed. Reg. 9451-9455 (Feb. 9, 1979).

But, more importantly, the accompanying legislative history of the Ashbrook and Dornan Amendments confirms Congress' intent to leave fully intact, and, indeed, to sanction, the existing nondiscrimination policies of the Service. On presenting his amendment, Representative Dornan stated (125 Cong. Rec. H5982 (daily ed. July 16, 1979)), "[l]et me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50." Similarly, when Senator Helms later introduced the Ashbrook Amendment in the Senate, he emphasized that it would not impair the effectiveness of outstanding procedures for enforcing a requirement of nondiscrimination (125 Cong. Rec. S11979-S11980 (daily ed. Sept. 6, 1979) (emphasis supplied)): "In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis." _/ In sum, by enacting the Ashbrook and Dornan Amendments, Congress in effect told the Internal Revenue Service that it should continue to enforce the nondiscrimination principle as long as it adhered to certain procedures and abandoned other proposed means of investigation and inquiry.

It is also significant that since the Commissioner announced the nondiscrimination policy on July 10, 1970, with the concurrence and approval of the President, numerous bills introduced in Congress have sought to modify the substantive principle that a racially discriminatory private school is not "charitable" within the meaning of Section 501(c)(3) and not eligible for deductible charitable contributions under Section 170. _/ None of them, however, has been enacted.

As this Court concluded in comparable circumstances in Runyon v. McCrary, supra, 427 U.S. at 174-175, "There could hardly be a clearer indication of congressional agreement with the view [announced by the Commissioner] * * *. Cf. Flood v. Kuhn, 407 U.S. 258, 269-285 [1972]; Joint Industries Board v. United States, 391 U.S. 224, 228-229 [1968]."

_/ To be sure, on the preceding day Senator Helms spoke at some length in criticism of the Commissioner's position that a racially discriminatory private school is not "charitable" under the tax laws. See 125 Cong. Rec. S11833-S11837 (daily ed. Sept. 5, 1979). Those remarks, however, were offered as his individual views. His statement quoted above in the text represents the consensus upon which the Senate voted in favor of the Ashbrook Amendment.

_/ See H.R. 68, 92d Cong., 1st Sess. (January 22, 1971); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973); S.103, 96th Cong., 1st Sess. (January 15, 1979); H.R. 1002, 96th Cong., 1st Sess. (January 19, 1979); H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979); S.449, 96th Cong., 1st Sess. (February 22, 2979); S.995, 96th Cong., 1st Sess. (April 9, 1979); H.R. 332, 97th Cong., 1st Sess. (January 9, 1981); H.R. 95, 97th Cong., 1st Sess. (January 5, 1981); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981).

3. The Commissioner's denial of petitioners' tax exemption because of their racially restrictive policies does not violate their right to free religious belief and exercise under the First Amendment

Both Goldsboro Christian Schools (Br. 31-44) and Bob Jones University (Br. 23-34) seek to excuse their failure to satisfy the nondiscrimination principle on the ground that their racially discriminatory practices are the outgrowth of sincere religious faith. But, as the court of appeals correctly held (81-3 Pet. App. A13-A14; footnote omitted), "the government's rule would not prohibit [petitioners] from adhering to [their] policy. Abandonment of the policy would not prevent [petitioners] from teaching the Scriptural doctrine of nonmiscegenation. Nor is any individual student * * * forced to personally violate his beliefs; no student is forced to date or marry outside of his race. We think these factors tip the balance in favor of the Service's nondiscrimination doctrine." Moreover, the Service's policy, applied evenhandedly to sectarian and nonsectarian schools, avoids government entanglement in matters of church doctrine, and does not involve preference of one sect or doctrine over another. Hence, the court of appeals concluded that "[t]he nondiscrimination policy also passes muster under the Establishment Clause" (id. at A14).

Since all that is at issue here is tax exempt status rather than a governmental prohibition of any of petitioners' practices, analysis begins with the principle that, while exemption from nondiscriminatory application of generally applicable tax laws is a constitutionally permissible accommodation of charitable organizations including churches themselves (see Walz v. Tax Commission, supra), it presumably is not constitutionally required. Once such exemptions have been granted, however, very serious First Amendment problems would be presented by any attempt to differentiate among churches or other religious organizations on the basis of their beliefs or religious practices. A grave constitutional problem would be presented, for example, if an exemption were to be denied solely because of admissions practices in a seminary or because the tenets of a faith disqualify certain classes of persons from eligibility for its clergy. Thus, in a news release issued nine days after its ruling with respect to private schools, the Service stated that "selectivity of students, as by a religious seminary, having no relation to racial discrimination would not be inconsistent with the IRS statement of position" (No. 81-3 J.A. A239).

On the other hand, some religious practices (even as part of a worship service), such as human sacrifice, may constitutionally be prohibited and, a fortiori, may constitutionally serve as a basis for denial of tax exempt status. Here, basically for the reasons we have discussed (pages , supra) concerning the applicability of 42 U.S.C. 1981 to petitioners, we submit that there is no constitutional impediment to basing denial of tax exempt status on petitioners' admissions practices (which involve commercial dealings with the public).

1. a. It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. Thus, this Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)), governmental interference with the dissemination of religious ideas (see Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. Town of McCormick, 321 U.S. 573 (1944)), or use of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." Braunfeld v. Brown, 366 U.S. 599, 607 (1961). But as the Court has also noted, "neutral prohibitory or regulatory laws having secular aims" may impose certain "incidental burdens" on free exercise when "the burden on First Amendment values is * * * justifiable in terms of the Government's valid aims." Gillette v. United States, 401 U.S. 437, 462 (1971); see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).

Thus, a person is not protected from every burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. Braunfeld v. Brown, supra, 366 U.S. at 603; Johnson v. Robison, 415 U.S. 361, 383-386 (1974); Gillette v. United States, supra, 401 U.S. at 461-462; see Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1878); Jacobson v. Massachusetts, 197 U.S. 11 (1905). In determining whether a particular statute is supported by a governmental interest that outweighs a free exercise claim, it is appropriate (McDaniel v. Paty, 435 U.S. 618, 635, n.8 (1978) (Brennan, J., concurring in the judgment)) —

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the objection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See Wisconsin v. Yoder, supra, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise of the First Amendment"); Johnson v. Robison, supra; Gillette v. United States, supra. However, "to strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." Braunfeld v. Brown, supra, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. Follett v. Town of McCormick, supra, 321 U.S. at 577-578; Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943); see Braunfeld v. Brown, *supra*, 366 U.S. at 606; cf. *United States* v. *Lee*, 479 F. Supp. 180 (W.D. Pa. 1980), appeal pending, No. 80-767, argued November 2, 1981. _/

Here, despite petitioners' claims to the contrary (81-1 Br. 36; 81-3 Br. 9), the Service's rulings do not place more than an indirect and limited burden upon any person's or any corporation's right to free religious belief or exercise. Petitioners do not seek on religious grounds to limit their student body to members of a particular sect or to those who espouse particular beliefs. Rather, the focus of the policies of petitioners' at issue here is on racially discriminatory practices, not on beliefs. In requiring that petitioners maintain racially non-discriminatory policies as a prerequisite to tax-exempt status, the Service does not purport to interfere with their right to espouse or teach a doctrine against interracial marriage, or with any student's right to adhere to such a doctrine. See *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 321-322 (5th Cir. 1977) (en banc) (Goldberg, J., concurring), cert. denied, 434 U.S. 1063 (1978). _/ Indeed, as this Court has noted (*Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976), quoted, *supra*, p. n.), even if the right of parents to have their children educated in schools fostering a belief in racial discrimination is assumed to be protected by the First Amendment, the First Amendment does not protect a school's practice of racial discrimination. See also *Bob Jones University*

_/ We submit, for example, that the First Amendment would not immunize a church from the tax on unrelated business income (see Sections 511-513 of the Code) if the church believed that it was its religious duty to conduct a business in competition with a particular company. See particularly Sections 512(b)(14) and 7605(c) of the Code.

_/ Nor do the Service's actions implicate the interests of a church in maintaining the intimacy of its activities, as petitioner Bob Jones University urges (81-3 Br. 23-25). Petitioners offer to the public on a commercial basis educational services that compete with programs of instruction in other schools and colleges (Pet. App. A3; J.A. A88-A89). Hence, "'Their actual and potential constituency * * * is more public than private.'" *Runyon* v. *McCrary*, 427 U.S. 160, 172, n.10 (1976) (quoting 515 F.2d 1082, 1089).

v. Johnson, 396 F. Supp. 597, 606-608 (D.S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975).

b. Sherbert v. Verner, 374 U.S. 398 (1963), and Wisconsin v. Yoder, supra, upon which petitioners rely (81-1 Br. 33-34, 81-3 Br. 23 et seq.), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome than here. In Sherbert, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in Sherbert was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in Thomas v. Review Board, No. 79-952 (Apr. 6, 1981), in which the petitioner terminated his employment when he was assigned to armament production. Petitioners face no similar choice here.

Similarly, in Yoder, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal education requirement after the eighth grade would violate the free exercise of their religion.[4] The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in Yoder thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although petitioners claim that their discriminatory practices are the product of religious belief, they are free to continue to maintain their racial restrictions and relinquish their claim to tax exemption and deductible charitable contributions. Alternately, petitioners can eliminate their racially restrictive admissions policies and other rules but continue to teach their religious belief in the separation of races. Unlike Sherbert and Yoder, the Service's policy therefore does not threaten the integrity of petitioners' religious beliefs or observances. See also McDaniel v. Paty, supra; Torcaso v. Watkins, 367 U.S. 488 (1961).

2. Finally, the court of appeals correctly held (81-3 Pet. App. A15-A16) that the Service's policy did not transgress Establishment Clause values because it avoids excessive entanglement with religion by appyling its policy to all religiously operated schools (as well as nonreligious schools). Thus, contrary to petitioner Bob Jones University's contention (Br. 32), the Service's policy does not have "the effect of creating a religious preference" and "official hostility toward non-preferred religions." In enforcing its ruling, the only inquiry that the Service uniformly undertakes is the relatively narrow inquiry whether the school maintains racially nondiscriminatory policies. Such an inquiry does not involve the government in preferring one religion over another, or even concerning itself with whether racial discrimination is motivated by religious belief. All private schools must demonstrate compliance with the nondiscrimination principle. Hence, the Service's policy does not violate the Establishment Clause. As the court of appeals pointed out (81-3 Pet. App. A16), "the principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing its most fundamental constitutional and societal values by means of a uniform policy, neutrally applied." See Gillette v. United States, 401 U.S. 437, 454-458 (1971). "And, the uniform application of the rule to all

giously operated schools *avoids* the necessity for a ntially entangling inquiry into whether a racially rictive practice is the result of sincere religious belief" -3 Pet. App. A15-A16; emphasis in original). Cf. *Brown* v. *e Christian Schools, Inc.*, *supra*, 556 F.2d at 323-324 ldberg, J., concurring); *Fiedler* v. *Marumsco Christian School*, *ra*, 631 F.2d 1144; *Bob Jones University* v. *Johnson*, *supra*, 396 Supp. at 606. Accordingly, the minimum intrusion occasioned the Commissioner's nondiscrimination policy does not violate e Establishment Clause.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General */

JOHN F. MURRAY
Acting Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT S. POMERANCE
Attorney

ANUARY 1982

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*/ The Solicitor General is disqualified in these cases.

TAB M

THURSDAY - DECEMBER 31, 1981

8:39 a.m.	Mr. Gideon	10:10 a.m.
9:22 a.m.	Mr. Gerber	9:23 a.m.
9:30 a.m.	Mr. Gerber	9:34 a.m.
10:05 a.m.	Mr. Gerber	10:10 a.m.
10:15 a.m.	Meeting w/Schmults at Justice Room 4111 w/McNamar, Ms. Waxman, Mr. Gideon	12:35 p.m.
12:39 a.m.	To lunch at the Metropolitan Club w/John Stough	2:20 p.m.
2:30 p.m.	Paperwork Reduction Act w/Ms. Beebe, Gideon, Dickinson - Room 3442 M.T.	4:21 p.m.
4:26 p.m.	Mr. Portney re: Deep Discount IDBs and Safe Harbor Lease Info. Returns	4:51 p.m.
4:51 p.m.	Messrs. Waffle and Lantonio	5:01 p.m. 5:04 p.m.
5:04 p.m.	John Williams	5:43 p.m.

CALLS

8:40 a.m.	Called Mr. McNamar - left word
8:55 a.m.	Mr. McNamar returned call
9:09 a.m.	Called Mr. Chapoton (in Houston)
9:42 a.m.	Called Secy. Regan (in Palm Springs)
9:52 a.m.	Buck Chapoton called - talked to Gideon and Commissioner
2:45 p.m.	Phil Caporaletti called - left message (call if you have time)
4:23 p.m.	Called Miss Waxman - left word
4:56 p.m.	Called Miss Waxman

TAB N

U.S. Department of Justice
Office of the Solicitor General

Files

Washington, D.C. 20530

December 31, 1981

Honorable Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Goldsboro Christian Schools, Inc. v.
United States of America, et al.,
No. 81-1; and
Bob Jones University v. United States,
81-3

Dear Mr. Stevas:

The government's brief on the merits in the above-captioned cases is presently due to be filed on December 31, 1981. Pursuant to Rule 29.2, we respectfully request a ten-day extension of time to file the brief to and including January 10, 1982. The additional time is needed to complete preparation and printing of the brief.

Sincerely,

Lawrence G. Wallace
Acting Solicitor General

cc: Claude C. Pierce, Esq.
William G. McNairy, Esq.
Edward C. Winslow, Esq.
John H. Small, Esq.
Brooks, Pierce, McLendon,
Humphrey & Leonard
Post Office Drawer U
Greensboro, North Carolina 27402

William Bentley Ball, Esq.
Philip J. Murren, Esq.
Richard E. Connell, Esq.
Kathleen A. O'Malley, Esq.
Ball & Skelly
511 North Second Street, P. O. Box 1108
Harrisburg, Pennsylvania 17108

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 4, 1982

Hon. Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

RE: Goldsboro Christian Schools, Inc. v. United States, No. 81-1; and Bob Jones University v. United States, No. 81-3

Dear Mr. Lee:

Your request of December 31, 1981 for an extension of time to file the respondent's brief on the merits in the above cases has been granted, and the time has been extended to and including January 10, 1982.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By June M. Hoffmann
(Miss) June M. Hoffmann
Assistant Clerk

cc: William G. McNairy, Esq.
William Bentley Ball, Esq.

TAB O

Memorandum

Subject

Impact of Bob Jones and Goldsboro Concession on Standing to Sue Litigation

Date

January 4, 1982

To

Edward C. Schmults
Deputy Attorney General

From

John F. Murray
Deputy Assistant Attorney General
Tax Division

As I advised you at the conference last Thursday, the Tax Division fears that concession of the Bob Jones and Goldsboro cases at the Supreme Court level will have a substantial adverse effect on our position on standing to sue. The basis for that fear cannot be demonstrated syllogistically or by conventional logical analysis. On the other hand, the belief that we would be worse off is based upon the perceptions of experienced litigators as to judicial attitude and behavior, and, as such, merits consideration.

For more than ten years, the Tax Division has opposed, on grounds of lack of standing, numerous efforts of plaintiffs describing themselves as taxpayers, or otherwise interested parties, to obtain injunctive orders directing the Secretary of the Treasury and the Commissioner of Internal Revenue to administer some one or more provisions of the Internal Revenue Code not in accordance with current practice but in accord with their particular desires. Wright v. Regan, 656 F. 2d 820 (C.A. D.C., 1981), now pending in the Supreme Court as Regan v. Wright on the Secretary's petition for certiorari (No. 81-790), is only a recent manifestation of such efforts. Many of these cases have raised questions of exemptions, but they have not been confined to that area. See, e.g., Tax Analysts & Advocates v. Blumenthal, 566 F. 2d 130 (C.A. D.C., 1977), cert. denied, 434 U.S. 1086 (1978), involving a challenge of Treasury's position with respect to foreign tax credits.

After the three-judge district court accepted the Treasury's substantive position on discriminating private schools in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), the question remained whether we should seek certiorari to questic the standing of the plaintiffs to maintain that suit. In recommending against certiorari, we acted upon the belief that such a case, involving racial discrimination, would present our standing position in a highly unfavorable context.

Although standing is analytically a threshold jurisdictional question in every case, it has many facets, and can rarely be completely severed from the substantive claim that the plaintiff seeks to present. Cf., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); Sierra Club v. Morton, 405 U.S. 727 (1972). We were pleased, accordingly, that when the standing question did reach the Supreme Court, it was in the context presented in Eastern Kentucky, in which the plaintiffs sought to require the Treasury to deny a hospital's exemption because it did not afford them free medical treatment.

Should Bob Jones and Goldsboro be disposed of without decision, Wright v. Regan, would remain. If the Supreme Court should deny certiorari, we would be governed by the unfavorable decision of the Court of Appeals on standing, and would be back in the District Court where the plaintiff would undoubtedly take the position that the plaintiffs in Green had taken, i.e., that it is unconstitutional for the Treasury to grant exemption to an institution discriminating along racial lines. That question was avoided in Green when the Treasury announced its position in 1970, and it was assumed that, had the Treasury not so acted, the District Court was prepared to uphold the plaintiffs' position. What the result would be today can hardly be asserted with any confidence. On the other hand, should the Supreme Court grant certiorari in Wright v. Regan, we would have the standing question presented to a Court fully aware of the statutory and constitutional questions in the background and aware that more than details of administration are involved. Indeed, in our petition for certiorari in Wright v. Regan, though the question presented is limited to the standing issue, we have referred to the substantive position taken in Goldsboro and Bob Jones.

The Court of Appeals was able to distinguish Eastern Kentucky and decide the standing question against us in Wright v. Regan. And while its opinion seems forced, there is no reason to believe that the Supreme Court could not distinguish Eastern Kentucky in a more sophisticated manner if it disapproved on substantive grounds the action taken by the Government in disposing of Bob Jones and Goldsboro without decision. We should then be faced with a standing decision that would encourage widespread challenges to Treasury positions not only by taxpayers but by other persons alleging that Treasury and Internal Revenue positions were unduly favorable to taxpayers.

In sum, we believe that disposing of Bob Jones and Goldsboro without decision on the merits would simply postpone disposition of the issue there until Wright v. Regan finally is decided, and that our standing position meanwhile would be placed at hazard in an extremely unfavorable context.

cc: Bruce Fein
Associate Deputy Attorney General

Charles Cooper
Special Assistant to the
Assistant Attorney General
Civil Rights Division

TAB P

Memorandum

Subject: Possible Impact of Any Decision to Modify the Government's Position in the Bob Jones case

Date: January 4, 1982
DJGavin:jall

To: John F. Murray
Deputy Assistant Attorney General
Tax Division

From: Donald J. Gavin
Special Litigation Counsel

A decision that the Government should modify its position in the Bob Jones case could have significant implications in terms of whether the Supreme Court will review the jurisdictional holding of the D.C. Circuit in Wright v. Miller, 639 F. 2d 147 (1980), petition for certiorari filed November 23, 1981, and further if review is not granted, such a decision could affect the nature and extent of any injunctive remedy in Wright. As you know, Wright involves a nationwide class action and impacts on every private elementary and secondary school in the United States, including religious schools. If the D.C. Circuit's decision is upheld, we would have an unprecedented involvement of the courts in the day-to-day administration of the tax laws in an extremely sensitive area. Also, after the court of appeals rendered its decision in Wright, Congress added to the FY 1982 Treasury Appropriations bill a spending restriction that specifically encompasses court orders entered after August 22, 1978, which by definition would encompass any injunctive orders entered in the Wright case. Thus, if the Supreme Court does not reverse the court of appeals, any future proceedings in Wright could present serious constitutional problems involving all three branches of government.

As noted at page 17 of the petition for certiorari filed in the Wright case, the situation in Wright, at present, is different from that which presented itself when the Green litigation was orginally initiated in 1969. Prior to 1970, the IRS' administrative position resulted in certain admittedly racially discriminatory schools receiving tax exempt status. Conversely, the IRS' published position as expressed in Rev. Rul. 71-447; Rev. Proc. 72-54; Rev. Proc. 75-50 and Rev. Rul. 75-231 is that all private tax-exempt schools, including church operated schools, may not be racially discriminatory. Accordingly, we have represented to the Supreme Court in Wright that the plaintiffs' quarrel with the IRS is not over the Government's substantive position (as was originally the situation in Green) but rather amounts to a generalized grievance over the manner in which the IRS is enforcing the non-discrimination requirement, and such a "generalized grievance" does not present a basis for invoking judicial power under the Constitution. See United States v. Richardson, 418 U.S. at 179-180.

However, if, as a result of Bob Jones, the IRS were to change its substantive position, then the argument presented in the Wright petition for certiorari for differentiating that case from the Green suit may be significantly undermined. The plaintiffs would then be able to point to a specific substantive position of the Service which they would characterize as governmental support for discrimination, which in turn made it imperative, under plaintiffs' view, for the courts to act. A further consideration would then be the nature of the remedy which the courts would impose and in view of the actions taken in the Green litigation in 1980, there is a substantial possibility that the courts would adopt a Norwood-based "inference of discrimination" approach in instances where a school, with insubstantial minority enrollment, was formed in the wake of local public school desegregation or was adjudicated in the past to be discriminatory. A very large number of schools have these characteristics surrounding their formation or expansion, and actual application of such inferences have created significant problems in the Green litigation when the injunction orders have been applied to church sponsored schools, wherein the tax exempt entity is the church under Code Section 508(c). If at all possible, that result should be avoided, since as a practical matter, the administrative and resource impact on the IRS would be enormous, and, as experience has shown, we are then confronted with an extremely difficult and controversial enforcement situation.

TAB Q

MONDAY - JANUARY 4, 1982

8:00 a.m.	Secretary's Staff	
9:00 a.m.	Rules and Regs. w/Chapoton, McNamar, Gideon - Room 3326 MT	10:55 a.m.
10:56 a.m.	Joe Davis	
11:00 a.m.	Jim Lantonio and Joe Davis	
11:10 a.m.	Mr. Goldberg	
12:00 noon	Lunch w/Ed Curran - Cosmos Club	
2:00 p.m.	Bob Jones Univ. w/Gideon, Chapoton, Glickman and Williams	4:22 p.m.
3:30 p.m.	Messrs. Portney and Halpern	4:00 p.m.
4:22 p.m.	Mr. Gideon re: Reorganization	

TAB R

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 5, 1982

To: The Attorney General

From: Wm. Bradford Reynolds WBR
Assistant Attorney General
Civil Rights Division

Re: Bob Jones University v. United States - No. 81-3

Goldsboro Christian Schools v. United States - No. 81-1

Currently pending before the Supreme Court on writs of certiorari are the above-referenced cases in which petitioner educational institutions challenge the Fourth Circuit's decisions that the Commissioner of Internal Revenue acted within his statutory authority in denying tax exempt status to Bob Jones and Goldsboro under Section 501(c)(3) of the Internal Revenue Code of 1954 and under Sections 170(a) and (c)(2) of the Code. The Treasury Department, through the Tax Division of the Department of Justice, argued below that the Commissioner's denials of a tax exemption was authorized, and that position was maintained in the memorandum of the United States, filed earlier in the Supreme Court, acquiescing in certiorari in the Supreme Court.

For the reasons summarized below, and set forth in considerably more detail in the memorandum attached hereto, I am of the opinion that the Commissioner's ruling denying tax exempt status to these private educational institutions finds no support in either the language or the legislative history of Section 501(c)(3). As a matter of both law and policy, my recommendation would be for the United States to confess error in the Supreme Court in Bob Jones and Goldsboro.

As a starting point, we can accept as given the fact that both Bob Jones and Goldsboro are "educational" non-profit organizations, the curriculum of which has a strong religious emphasis. It is also uncontested that both schools have policies that are admittedly racially discriminatory.1/ This latter fact led to the denial of tax-exempt status under Section 501(c)(3), and the tax benefits associated with qualification as a Section 501(c)(3) organization, based on a 1970 opinion of the Internal Revenue Service announcing that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racial discriminatory policies and that it would not continue to treat gifts to such schools as deductible contributions under Section 170. 2/

The central issue before the Supreme Court at the present time is whether the 1970 Internal Revenue Service opinion is a proper interpretation of Section 501(c)(3). To state it another way, did Congress intend to deny tax exempt status

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1/ Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. Similarly from its inception Bob Jones has maintained a racially restrictive policy, also based on religious tenents, forbidding its students to engage in interracial dating and interracial marriage.

2/ This opinion marked a clear departure from the position taken by the Internal Revenue Service in the preceding years. The Service's reinterpretation of Section 501(c)(3) was spurred by litigation. In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under §501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501(c)(3), but it reversed its position prior to entry of the district court's decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 no. 11 (1974).

under Section 501(c)(3) to non-profit educational institutions that, on the basis of sincerely held religious beliefs, maintain racially discriminatory admissions policies or other racially discriminatory practices? I think not.

The search for congressional intent must, of course, begin with the words of the statute to be construed. *E.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union*, ___ U.S. 101 S. ___ Ct. 1[illegible]1, 1580 (1981); *United States* v. *Oregon*, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, *or* educational purposes, *or* for the prevention to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis added). By separately enumerating eight purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them with the disjunctive "or," Congress clearly manifested its intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. *See*, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.") 3/ Equally clear from the separate references in Section 501(c)(3) to "educational" and "charitable" organizations is "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." *Prince Edward School Foundation* v. *United States*, ___ U.S. ___, 101 S. Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

Indeed, the regulations promulgated by the Internal Revenue Service under Section 501(c)(3) are wholly inconsistent with the statutory interpretation it now advocates. According

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3/ This common sense interpretation of the plain language of Section 501(c)(3) is confirmed by sister provisions in the Internal Revenue Code subchapter dealing with exempt organizations. Thus the language used by Congress in Sections 503, 504 and 513 of the Code unmistakably reflects a congressional intent to recognize each of the purposes or functions enumerated in Section 501(c)(3) as a discrete and independent "basis for . . . exemption of Section 501(a)." *See* 26 U.S.C. §§ 503(b)(3), 504(a)(1) & (c) and 513(a).

to §1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for one or more of the following purposes: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. §1.501(c)(3)-1(d)(1)(i) (emphasis added). The regulations state further that

> since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . . . For example, if an organization claims exemption on the ground that it is "educational," exemption will not be denied if, in fact, it is "charitable"." 26 C.F.R. §1.501(c)(3)-1(d)(1)(iii) (emphasis added).

Thus, under both the statute and the Service's interpretive regulations, an organization is entitled to tax-exempt status if it is organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational."4/ Accordingly, the contrary

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4/ Even if it could reasonably be concluded that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(3)(c), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(3)(c) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus do violence to the familiar rule that statutes be construed to give effect to each word and that no one part of a statute be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

interpretation of Section 501(c)(3) adopted by the Service and the Fourth Circuit must fall, for "[t]he courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." National Life and Accident Ins. Co. v. United States, 524 F. 2d 559, 560 (6th Cir. 1975).

Where the statutory language is as clear and unambiguous as Section 501(c)(3), courts ordinarily do not delve deeper in order to divine the intent of Congress. E.g., Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485, 492 (1947). Even so, the interpretation advanced by the Commissioner and Court of Appeals in these two cases finds no support in the statute's legislative history.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 19~~8~~4, 0 28 Stat. 556, 5/ which provided in pertinent part: "[N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes." There is no indication that Congress intended to distinguish religious and educational colleges from charitable organizations, or that its aim was to incorporate the "common law of charitable trusts" in this taxing statute.

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, 38 Stat. 114, 166, which exempted from the income tax:

> Any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.

Under the common law, of course, the income of a charity could not inure to the benefit of a private person. See 4A Scott, The Law of Trusts §376(2)(d) ed. 1956. Thus, inclusion of

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5/ This corporate income tax act was later declared unconstitutional by the Supreme Court in Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895).

a requirement to that effect in the statute was unnecessary if Congress had intended to import the common-law of charitable trusts into the exemption.

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes, including purposes which would have been within the initial exemption if Congress had intended the word "charitable" to have its common-law meaning.6/ In each succeeding revenue act, however, including the 1954 Code, Congress simply reenacted its initial language exempting any organization devoted to "religious, charitable, . . . or educational purposes."7/ The interpretative regulations issued by the Internal Revenue Service in connection with these revenue acts uniformly interpreted the word "charitable" in its "popular and ordinary sense" as meaning "relief of the poor" rather than in its broader common-law sense. 8/

6/ For example, the Revenue Act of 1918, 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." Similarly, the Revenue Act of 1921, 42 Stat. 227, expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad-law sense.

7/ See Revenue Act of 1918, Ch. 254, §231(6), 40 Stat. 1057; Revenue Act of 1921, Ch. 98, §231(6), 42 Stat. 227; Revenue Act of 1924, Ch. 176, §231(6), 43 Stat. 253; Revenue Act of 1926, Ch. 20, §231(6), 44 Stat. 9; Revenue Act of 1928, Ch. 562, §103(6), 45 Stat. 791; Revenue Act of 1932, Ch. 154, §103(6), 42 Stat. 169; Revenue Act of 1934, Ch. 216, §101(6), 48 Stat. 680; Revenue Act of 1936, Ch. 740, §101(6), 49 Stat. 1648; Revenue Act of 1938, Ch. 554, §101(6), 52 Stat. 447; Internal Revenue Code of 1939, Ch. 1, §101(6), 53 Stat. 1; Internal Revenue Code of 1954, Ch. 591, §501(c)(3), 68 A. Stat. 163.

8/ See I.T. 1800, II-2 c.b. 152, 153 (Revenue Act of 1921); Treas. Reg. 65, Art. 517 (Revenue Act of 1924); Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932); Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938); Treas. Reg. 103, §19.101(6)-1 (Internal Revenue Code of 1939); Treas. Reg. 111, §29-101(6)-1 (1939 Code); Treas. Reg. 118, §39.101(6)-1(b) (1939 Code).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor" to include purposes such as "advancement of religion," "advancement of education or science," and "lessening of the burdens of Government." 26 C.F.R. §1.501(c)(3)-1(d)(2). The same regulation, however, defines "educational" without any reference to the notion of charity, 9/ thus reflecting the Service's view (pre-1970) that although "charitableness" is not confined to "relief of the poor," an "educational" organization need not also be "charitable" in order to qualify for tax-exempt treatment under Section 501(c)(3).

In sum them, since ~~Since~~ 1894 Congress has consistently and repeatedly manifested its intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. The Commissioner's contrary interpretation of Section 501(c)(3) is inconsistent with the plain language of the statute, with the statute's legislative history, and with the Commissioner's own interpretative regulations.

Moreover, Congress has recently expressed grave reservations concerning the Service's authority to deny tax-exempt status to organizations deemed by the Service to violate public policy. Sponsors in both the House and the Senate of the Ashbrook Amendment to the Appropriations Act of 1980 (which prohibited the Service from using any funds to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious or church-operated schools under Section 501(c)(3) . . . unless in effect prior to August 22, 1978") expressed the view that the Service lacks authority to deny tax-exempt status to private educational

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9/ The regulations define "educational" as follows:

> The term "educational," as used in section 501(c)(3), relates to --
>
> (a) the instruction or training of the individual for the purpose of improving or developing his capabilities; or
>
> (b) the instruction of the public on subjects useful to the individual and beneficial to the community. 26 C.F.R. §1.501(c)(3)-1(d)(3) (1959).

institutions because of racially discriminatory policies. In passing the Ashbrook Amendment, Congress chose to preserve the status quo pending further consideration of the correctness of the Service's interpretation of Section 501(c)(3). Thus, Congress' failure legislatively to overrule the Service cannot be construed as congressional approval of the Service's interpretation of Section 501(c)(3). Even assuming arguendo that it could, however, it is well settled that approval by a subsequent Congress provides little insight into the proper interpretation of a statute -- Section 501(c)(3) -- passed by an earlier Congress. See, e.g., United States v. Wise, 370 U.S. 405, 411 (1962); United States v. Southwestern Cable Company, 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance'"). Nor can Congress' failure to overturn administrative and judicial interpretations of Section 501(c) be deemed a congressional ratification of those interpretations. See, e.g., Ex Parte Endo, 323 U.S. 283, 303 n. 24 (1944); United States v. Price, 361 U.S. 304, 310-11 (1960).

For the foregoing reasons, it is my judgment that the United States should not continue to press for affirmance of the Fourth Circuit decisions in these cases. The only issue presented is whether Congress intended by enactment of Section 501(c)(3) to delegate to the Internal Revenue Service authority to withhold tax exempt status from otherwise qualified organizations based on practices which the IRS deems to be contrary to public policy. All objective evidence of Congressional intent underscores that it did not. As a matter of policy, it is as unsound for the Executive Branch to be extending through the regulatory process the reach of legislation as it is for the courts to take such liberties.

If Congress chooses to engraft a civil rights enforcement responsibility upon the taxing authority of the Internal Revenue Service, such an intention should be clearly reflected in the law and its legislative history. Where, as here, the taxing arm of the Federal Government has not been explicitly assigned such powers, neither the Executive Branch nor the Courts should create authority that Congress has not seen fit to confer. This does not in any way condone racial discrimination, which is admittedly offensive to the most fundamental of constitutional principles. Rather, it recognizes that the Legislature is the Branch of Government charged with the responsibility of enacting statutes to combat that evil, and where it has not seen fit to use the taxing laws for that purpose, that judgment is binding on both the Executive and Judicial Branches.

cc: Edward C. Schmults
John F. Murray
Theodore B. Olson

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

— Tim McNamar
Roscoe Egger
Ken Gideon
Buck Chapman
② Larry Wallace.

January 5, 1981

MEMORANDUM FOR: Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

FROM: Charles J. Cooper CJC
Special Assistant to the
Assistant Attorney General

Carolyn B. Kuhl CBK
Special Assistant to the
Attorney General

RE: Analysis of the statutory authority for the Internal Revenue Service's Ruling that a private school does not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 unless it establishes that its admissions and educational policies are operated on a racially nondiscriminatory basis

Currently pending before the Supreme Court on writs of certiorari are Bob Jones University v. United States, No. 81-3, and Goldsboro Christian Schools, Inc. v. United States, No. 81-1, in which petitioner educational institutions challenge the Court of Appeals decision that the Commissioner of Internal Revenue acted within his statutory authority in determining that, because of their undisputed racially restrictive admissions policies and other discriminatory policies, petitioners do not qualify as tax-exempt organizations under Section 501(c)(3) of the

Internal Revenue Code of 1954 or as eligible donees of charitable contributions deductible under Section 170(a) and (c)(2) of the Code. As detailed fully in the following discussion, the Commissioner's ruling denying tax-exempt status to racially discriminatory private educational institutions is supported by neither the language nor the legislative history of Section 501(c)(3).

STATUTE INVOLVED

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§501(a) and (c)(3) (1971)) provide in pertinent part:

> Sec. 501. Exemption from tax on corporations, certain trusts, etc.
>
> (a) Exemption from taxation.--An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> (c) List of exempt organizations.--The following organizations are referred to in subsection (a):
>
> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

FACTUAL BACKGROUND

A. Bob Jones University - No. 81-3

1. Petitioner Bob Jones University ("Bob Jones") is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures . . .'" Bob Jones provides instruction for students from kindergarten through college and graduate school, enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects. All courses are taught in accordance with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians, and students are screened as to their religious beliefs and their conduct is strictly regulated.

From its inception, Bob Jones has maintained a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. These policies are based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures. Prior to 1971, Bob Jones excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but Bob Jones continued to deny admission to unmarried blacks unless the applicant had been a staff member of Bob Jones for at least four years. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n. 9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). During this latter period, Bob Jones' doctrinal policy did not specifically require the exclusion of blacks, but denying admission to unmarried blacks was, in the school's judgment, the best means of implementing its prohibition against interracial dating and marriage.

In response to decisions of the court of appeals' in Bob Jones University v. Johnson, 529 F. 2d 514 (4th Cir. 1975), and in McCrary v. Runyon, 515 F. 2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), Bob Jones revised its admissions policy to permit unmarried blacks as well as married blacks to enroll as students. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage, and it established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate Bob Jones' rules and prohibitions against interracial dating. The University required each student to attend a "rules meeting" at which the several discriplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions.

Until 1970, the Internal Revenue Service recognized Bob Jones as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code") (26 U.S.C. §501(c)(3)). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies and that it would not continue to treat gifts to such schools as deductible contributions under Section 170.[1] In November 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including Bob Jones, announcing its new policy and requesting proof of a nondiscriminatory admissions policy. Bob Jones responded that it did not admit black students and, in September 1971, further stated that it had no intention of altering that policy. The Service therefore commenced administrative proceedings leading to the revocation of Bob Jones' tax exemption and of its advance assurance of deductibility. In January 1976, after the university's attempt to enjoin those proceedings had failed in the Supreme Court, see Bob Jones University v. Simon, 416 U.S. 735 (1974), the Service issued a final notice of revocation, effective as of December 1, 1970.

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[1] The Service's reinterpretation of Section 501(c)(3) was spurred by litigation. In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under §501(c)(3) to private schools in Mississippi that discriminate against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501(c)(3), but it reversed its position prior to entry of the district court's decision in favor of plaintiffs. The Supreme Court's summary affirmance of Green, therefore, "lacks the precedential weight of a case involving a truly adversary controversy." Bob Jones University v. Simon, 416 U.S. 725, 740 n. 11 (1974).

2. Seeking to reinstate its exemption, Bob Jones brought this action in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975.[2] The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975. Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized and operated exclusively for religious and educational purposes, and that the University was not required to demonstrate a nondiscriminatory racial policy in order to so qualify. 468 F. Supp. 890 (D.S.C. 1978).

A majority of the court of appeals reversed, rejecting the district court's hypothesis that Bob Jones was entitled to tax exempt status because it is a "religious" institution and qualifies under the separately enumerated "religious" category of Section 501(c)(3). Relying on the three-judge district court's decision in Green v. Connally, 330 F. Supp. 1150 (D.D.C.), summarily aff'd per curiam, sub nom. Coit v. Green, 404 U.S. 997 (1971), the court concluded that Section 501(c)(3) must be viewed against the background of the law of charitable trusts. Thus, the panel majority agreed with the Green decision (330 F. Supp. at 1156-1160) that to be eligible for tax exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy." The majority found support for this view in the statutory framework of the 1954 Code: "Section 170 of the Code, the companion provision to Section 501(c)(3), places the separately enumerated purposes in that section under the broad heading of 'charitable.'" Because Bob Jones' racial policies violated clearly defined public policy, rooted in the Constitution and the decisions of this Court condemning racial discrimination, and since there is a government policy against subsidizing racial discrimination in education, public or private, the court of appeals majority held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status . . ."

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[2] Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. §3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

In so doing, the majority rejected Bob Jones' argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit Bob Jones from adhering to its teachings nor force any individual student to violate his beliefs. With respect to Bob Jones' Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools avoids the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief" (Pet. App. A16; emphasis in original).

Judge Widener dissented, concluding that "Bob Jones University is a religious organization" within the meaning of Section 501(c)(3) and that the majority, the Service, and the district court in Green v. Connally, supra, had misconstrued Section 501(c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt qualify as "charitable" organizations under the common law of charitable trusts. According to Judge Widener, Section 501(c)(3) grants tax-exempt status to each class of organization enumerated in the statute, and because Bob Jones falls within one of those classes ("religious"), the IRS cannot revoke the exemption granted by Congress. Finally, Judge Widener stated that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private, non-tax-funded religous institutions.

B. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. ("Goldsboro"), is a North Carolina nonprofit organization incorporated in 1963 "'to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *." At least since 1969, Goldsboro maintained a regularly enrolled student body (750 students in 1973-74) for kindergarten and grades one through twelve and has satisfied the requirements of North Carolina for secular education in private schools. Submissions to the State indicate that Goldsboro requires its high school students to take one Bible-related course during each semester. In keeping with Goldsboro's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, Goldsboro's practice is to begin each class with a prayer.

Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God." Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that Goldsboro did not qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code and, in 1974, assessed FICA and FUTA taxes against it. After making partial payment, Goldsboro instituted this action in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 in federal withholding, FICA, and FUTA taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period.

2. On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied Goldsboro tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because its racially discriminatory admissions policy violated the declared public policy of the United States. The court of appeals affirmed, with one judge dissenting. Finding the case "identical" to the Bob Jones University case, the court of appeals majority

upheld the Service's action on the authority of its decision in that case. Judge Field dissented for the reasons stated by Judge Widener in his dissenting opinion in Bob Jones University.

DISCUSSION

The threshold issue presented by these cases is one of statutory construction: Did Congress intend to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that, on the basis of sincerely held religious beliefs, maintain racially discriminatory admissions policies or other racially discriminatory practices? In order to answer this question affirmatively, as have the Internal Revenue Service, the district court in Green v. Connally, supra, and the Court of Appeals for the Fourth Circuit, one must conclude (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable" and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common-law sense -- that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy.

A. Statutory Language

The search for congressional intent must, of course, begin with the words of the statute to be construed. See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, ___ U.S. ___, 101 S. Ct. 1571, 1580 (1981); United States v. Oregon, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis added). By separately enumerating eight purposes or functions entitling nonprofit corporations to tax-exempt treatment, and by joining them with the disjunctive "or," Congress clearly mainfested its intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.") Equally clear from the separate references in Section 501(c)(3) to "educational" and "charitable" organizations is "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." Prince Edward School Foundation v. United States, ___ U.S. ___, 101 S. Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

This common-sense interpretation of the plain language of Section 501(c)(3) is confirmed by sister provisions in the Internal Revenue Code subchapter dealing with exempt organizations. The language employed by Congress in Sections

503, 504, and 513 of the Code unmistakeably reflect a congressional intent to recognize each of the purposes or functions enumerated in Section 501(c)(3) as a discrete and independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. §§503(b)(3), 504(a)(1) & (3), and 513(a). Prior to 1969, Section 503 provided for the denial of tax-exempt status to organizations otherwise qualified under 501(c)(3) if they engaged in certain prohibited transactions.[3/] Section 503(b) provided, in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) . . . except --
>
> (1) a religious organization . . .;
>
> (2) an educational organization . . .;
>
> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; . . .

[3/] References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

The language underscored above, which also appeared in the pre-1969 version of Section 504(a)(1) and (3)[4/] and appears in the current version of Section 513(a),[5/] plainly reflects Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501 and (2) that each such purpose or function constitute a sufficient and independent basis for exemption under Section 501(a).

[4/] Section 504(a)(1) and (3) provided, for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> "unreasonable in amount or duration in order to carry out the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3); or . . . (3) invested in such a manner as to jeopardize the carrying out of the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3)."

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code. This Section 504 was repealed by Congress in 1969. P.L. 91-172, §101(j)(15).

[5/] Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511, (which imposes a tax on unrelated business income of otherwise tax-exempt organizations means "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501 (or, . . . to the exercise or performance of any purpose or function described in Section 501(c)(3)), . . ." Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

Indeed, the regulations promulgated by the Internal Revenue Service under Section 501(c)(3) are wholly inconsistent with the statutory interpretation it now advocates. According to § 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for one or more of the following purposes: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. § 1.501(c)(3)-1(d)(1)(i) (emphasis added). The regulations state further that

> since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes. . . . For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it it "charitable"." 26 C.F.R. § 1.501(c))(3)-1 (d)(1)(iii) (emphasis added).

As noted above, supra at ____, the Court of Appeals found support for its interpretation of Section 501(c)(3) in Section 170 of the Code, which "places the separately enumerated purposes in [§ 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." 639 F. 2d at 151 n.6. The actual language of Section 170, however, belies the Court's construction of either section of the Code. In the first place the "broad heading" or caption for Section 170 is

"Charitable, etc., contributions and gifts" (emphasis supplied), which suggests that the contributions and gifts to be discussed in that section would not all be considered contributions and gifts to "charitable" organizations as that term is used in other sections of the Code. The definition of "charitable contributions" for purposes of Section 170 confirms that reading. Subsection (c) of Section 170 states in relevant part as follows:

> (c) Charitable contribution defined.--For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of--
>
> . . .
>
> (2) A corporation, trust, or community chest, fund, or foundation--
>
> (A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States;
>
> (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; . . . 26 U.S.C. §170 (1971) (emphasis added).
>
> (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and
>
> (D) which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), and political campaign on behalf of any candidate for public office. 26 U.S.C. § 170 (1971) (emphasis supplied).

The definition of the term "charitable contribution" relates solely to Section 170 and it is defined partly in terms of the purposes for which certain organizations are organized and created, namely, "religious, charitable, scientific, literary, or educational [or specified other] purposes." These various individual purposes each qualify an organization to receive "charitable contributions." It would be an error of logic to interpret this Section conversely to mean that each type of organization which receives a "charitable contribution" must serve a "charitable" purpose as well as one of the other separately specified purposes. "Charitable contribution" is defined in terms of gifts to organizations which serve certain purposes, the organizations do not take on a "charitable" purpose because they receive what the drafters[6] of Section 170 have chosen to call "charitable contributions."

It is thus clear from both the statute's language and the Service's interpretive regulations, that an organization is eutitled to tax-exempt status if it is organized and operated exclusively for any one of the purposes of functions enumerated in Section 501(c)(3). Even if it could reasonably be concluded, however, that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common-law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common-law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus do violence to the familiar rule that statutes be construed to give effect to each word and that no one part of a statute be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

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[6] Moreover, if all organizations which receive "charitable contributions were required to conform to common-law notions of charity, the requirement of § 170(c)(2)(C) that no part of the earnings of an organization which receives "charitable contributions" may "inure [] to the benefit of any private shareholder or individual," would be superfluous. See p. ___, infra.

The Service recognized this fact early on in Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than its common-law sense. In 1923, the Service stated in I.T. 1800, II-2

C.B. 152, 153, that the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 [Section 501(c)(3)'s predecessor] means "relief of the poor":[7]

> It will be seen that "charitable" in this broad sense includes, among other things, education, religion, relief of the poor, social service, and civic or public benefactions. On the other hand, "charitable" in its popular and ordinary sense pertains to the relief of the poor. . . .
>
> In Section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational, . . . It seems obvious that the intent must have been to use the word "charitable" in Section 231(6) in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civic, or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable,

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[7] That the Service promulgated this interpretive regulation temporally closer to the initial enactment of the early revenue statutes entitles it to special credence. An agency's interpretive regulation is due particular respect when it reflects a contemporaneous statutory construction. *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961). *See* *NLRB* v. *Boeing Co.*, 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference . . ."). *See* also discussion in text at ___, *infra*.

scientific, literary, or educational . . . ." (Emphasis added). 8/

Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational." Accordingly, the contrary interpretation of Section 501(c)(3) adopted by the Service and the Fourth Circuit is incorrect, for "[t]he courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning effect to statutes as passed by Congress." National Life and Accident Ins. Co. v. United States, 524 F. 2d 559, 560 (6th Cir. 1975).

B. Legislative History.

Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, e.g., Ernst & Ernst v. Hochfelder, 425 U.S. 199, 201 (1976); United States v. Oregon, 366 U.S.

8/ The uncertainty that would be generated in the tax law by granting exemptions to any entity organized "for purposes beneficial to community," Commissioners of Income Tax v. Pemsel, supra, is in all likelihood precisely the reason that Congress chose to enumerate specifically certain types of organizations deemed worthy of tax exemption without regard to whether they qualified as common-law charities. To do otherwise would have exposed organizations otherwise qualifying for tax-exempt status under Section 501(c)(3) to whims of public fashion. For example, in 1844 Justice Story suggested that a school organized to teach Judaism cannot be considered charitable. Vidal v. Girard Ex'rs, 43 U.S. (2 How.) 127, 198-201 (1844); see Neuberger & Crumpler, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979).

643, 648 (1961), a review of that legislative history reveals no support for the construction adopted by the Commissioner and the Court of Appeals.

The exemptions from taxation now contained in Section 501(c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556,[9] which provided in pertinent part: "[N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or eduational purposes."

As previously discussed, it is clear from the words of the statute that Congress intended to distinguish religious and educational corporations from charitable corporations. There is no indication that Congress incorporated or had reference to the "common law of charitable trusts" in enacting this taxing statute.

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II(G)(A) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

This legislation broadened the 1894 exemption to include "scientific" corporations and added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, however,

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9/ This corporate income tax act was later declared unconstitutional by the Supreme Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895).

income of a charity could not inure to the benefit of a private person. See 4 A. Scott, The Law of Trusts § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute was unnecessary if Congress had intended to condition tax exemption on an organizations ability to qualify as common-law charity.

The conclusion that Congress did not intend to incorporate the common law of charitable trusts into the exemption is further supported by the Service's contemporaneous construction of the early revenue acts. In a ruling issued in 1921 the Service stated that charitable trusts were not exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This position was also contained in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common-law sense. Moreover, as previously discussed, supra at ___, in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common-law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932,[7] and regulations issued by the Service under those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (Revenue Act of 1924). "Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor."[8]

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[7] Revenue Act of 1924, ch. 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

[8] Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement would have been unnecessary if Congress had intended for all organizations to qualify as common-law charities in order to be exempt from taxation. See 4 A. Scott, The Law of Trusts § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447, also carried forward the same exemption, and the regulations promulgated under these acts continued to define the term "charitable" as "relief of the poor." See Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

In the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the fifteen years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" to mean relief of poverty. See Treas.

Reg. 103, § 19.101(6)-1 (1939 Code); Treas. Reg. 111, § 29.101(6)-1 (1939 Code); Treas. Reg. 118, § 39.101(6)-1(b) (1939 Code).

Section 501(c)(3) of the 1954 Code, ch. 591, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety." In addition, Congress tightened the restrictions on political activities of tax-exempt organizations.[9/]

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from Sections 101 and 421 of the 1939 Code. No change in substance has been made except that employees' pension trust, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis added).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor." In § 1.501(c)(3)-1(d)(2) of its 1959 regulations, the Service concluded:

9/ The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

> The term "charitable" is used in section 501(c)(3) in its generally excepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the under-privileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. . . .

Obviously, the purpose of this regulation is to make clear that the meaning of "charitable" is not "limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant and without independent significance in the statute. The regulation in no way suggests that other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also qualify as "charitable." Indeed, the same regulation defines "educational" without any reference to the notion of charity:

> The term "educational", as used in section 501(c)(3), relates to--
>
> (a) The instruction or training of the individual for the purpose of improving or developing his capabilties; or

> (b) The instruction of the public on subjects useful to the individual and beneficial to the community. 26 C.F.R. § 1.501(c)(3)-1(d)(3) (1959). 10/

Under the Service's own interpretive regulations, Bob Jones and Goldsboro clearly qualify as "educational" institutions entitled to tax-exempt status under Section 501(c)(3), notwithstanding their racially discriminatory practices.

Since 1894, Congress has consistently and repeatedly manifested its intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. Congress has never evidenced an intent to deny tax-exempt status to an otherwise qualified "educational" organization simply because it does

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10/ To the extent that the Service's regulations can be interpreted to require "educational" organizations to also satisfy the requirements of "charitable" organizations, they are inconsistent with the plain language of Section 501(c)(3) and must fall. The Supreme Court outlined the limits of the Executive's interpretive powers in Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129, 130 (1935):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

not also qualify as a common-law "charitable" organization. The Commissioner's contrary interpretation of Section 501(c)(3)--which, having been adopted some 70 years after Congress' initial enactment of the relevant statutory language, hardly qualifies as "a substantially contemporaneous construction of the statute by those presumed to be aware of congressional intent," National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979)--is inconsistent with the plain language of the statute, with the statute's legislative history,[11] and with the Service's own interpretive regulations.

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[11] The only piece of legislative history relied upon by the Court of Appeals in affirming the Commissioner's denial of tax-exempt status to Bob Jones was the following excerpt from the House Report accompanying the 1939 Internal Revenue Code:

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare. H.R. Rep. No. 1820, 75th Cong. 3d Sess. (1939) (emphasis added)

The Court of Appeals reasoned that Bob Jones, because of its racially discriminatory practices, does not promote the general welfare and, thus, was not intended by Congress to qualify for tax exempt status. See Pet. App A8 id. Terming similar reasoning "somewhat of a nonsequitur" the district court in Bob Jones University cogently noted:

> [O]ne facet of [public policy] is that society may provide relief from taxation to those organizations, such as plaintiff religious organization, that are of benefit to the public. The good resulting to the public from these groups depends upon the

(continued)

C. Congressional Action Subsequent To 1970.

Congress has recently expressed grave reservations concerning the Service's authority to deny tax-exempt status to organizations deemed by the Service to violate public policy. In the Ashbrook Amendment to the Treasury, Postal Service, and General Government Appropriations Act of 1980, Pub. L. No. 96-74, § 103, 93 Stat. 559, Congress prohibited the Service from using any funds appropriated under the Act to implement or enforce any rule or procedure "which would cause the loss of tax-exempt status to private, religious or church-operated schools under Section 501(c)(3) . . . unless

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11/ (Continued)

> fulfillment of their purposes. Because one of these organizations may have, in an area of its operations, engaged in conduct that might not have been completely in line with some other aspect of public policy does not automatically mean the public no longer benefits from the organization. [The Commissioner] seems to imply that a change in plaintiff's [racially discriminatory] policies to conform to [the Commissioner's] guidelines would transform the religious organization from one that did not benefit the public into one that did, although the function and purposes of plaintiff remained unchanged throughout. Pet. App. at 65 n. 8.

in effect prior to August 22, 1978."[12] Both Congressman Ashbrook, the House sponsor of the Amendment, and Senator Helms, who introduced the Ashbrook Amendment in the Senate, clearly expressed the view that the Service lacks authority to deny tax-exempt status to private educational institutions because of racially discriminatory policies.[13]

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[12] Similarly, the Dornan Amendment to the Act prohibits the funding of two proposed revenue procedures designed to supplement the Service's existing procedures for verifiying whether the actual practices of certain schools conform to their certifications of nondiscrimination.

[13] In discussing his amendment on the House floor, Congressman Ashbrook stated:

> So long as the Congress has not acted to set forth a national policy respecting denial of tax exemptions to private schools, it is improper for the IRS or any other branch of the Federal Government to seek denial of tax-exempt statutes.
>
> . . . .
>
> For an agency to permit itself to be guided by pressures of pending legal action, other Federal agencies, outside pressure groups, or changes in an administration is to confuse its own role as tax collector with that of legislator, jurist, or policymaker.
>
> There exists but a single responsibility which is proper for the Internal Revenue Service:

(continued)

That Congress failed to enact legislation specifically designed to overrule Green v. Connally, supra, and repeal the revenue rulings and procedures which followed upon that decision does not reflect congressional approval of the Service's interpretation of Section 501(c)(3). To the contrary, in passing the Ashbrook Amendment Congress chose to preserve the status quo pending further consideration of the correctness of Green and the Service's acquiescence in that decision. Senator Helms clearly stated this congressional purpose:

13/ (continued)

> To serve as tax collector. It is the responsibility of Congress to conduct oversight over this agency to prevent transgressions into legislative authority. Cong. Rec., 96th Cong. 1st Sess., No. 12, June 25, to July 13, 1979, at H 5879-80.

Senator Helms was even more explicit, stating in debate on the Ashbrook Amendment:

> Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purpose as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet the requirements of one of the other listed purposes. [125 Cong. Rec. S. 11835 (daily ed. Sept. 5, 1979).]

> . . . IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of the IRS to act against offending schools on a case-by-case basis.
>
> My amendment is necessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem. [125 Cong. Rec. S. 11980 (daily ed. Sept. 6, 1979).]

Moreover, even if Congress' failure to legislatively overrule Green and the Service could reasonably be construed as congressional approval of the Service's construction of Section 501(c)(3), such approval would provide little insight into the proper interpretation of Section 501(c)(3) itself. The legislative intent to be devined in interpreting that statute is the intent of the Congress that enacted it, not the intent of some subsequent Congress.

> [S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.

United States v. Wise, 370 U.S. 405, 411 (1962). Accord, United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before another Congress have 'very little, if any, significance'"); Oscar Mayer & Co. v.

Evans, 441 U.S. 750, 758 (1979) ("'It is the intent of the Congress that enacted [the section] . . . that controls.'"); Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965) ("the abortive action of the subsequent Congress [in considering a 'clarifying' amendment] 'would not supplant the contemporaneous intent of the Congress which enacted the . . . Act'").

Nor does Congress' failure to overturn the Service's interpretation of Section 501(c)(3) indicate that Congress has in some sense ratified the Service's position. For legislation to be construed as a binding ratification of the action of the executive branch, the legislation "must plainly show a purpose to bestow the precise authority which is claimed." Ex Parte Endo, 323 U.S. 283, 303 n.24 (1944). See Fuber v. Allen, 396 U.S. 168, 194 (1969) (the Court will not attribute ratification to Congress despite active congressional involvement in reviewing certain administrative action). Certainly, the Ashbrook Amendment, which is premised on preserving the status quo pending possible future congressional consideration of the Service's present position, does not indicate a purpose affirmatively to bestow any authority on the Service.

Similarly, with regard to Congress' failure to act in response to Green v. Connally, supra, ratification by Congress of a lower court's position may not be inferred when Congress fails to legislate in response to a case, even when legislation to overturn the lower court[14] decision has been considered but not enacted. *United States* v. *Price*, 361 U.S. 304, 310-11 (1960); *United States* v. *Welden*, 377 U.S. 95, 102 n. 12 (1964) ("'We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action.'" quoting *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 534 (1947)).

D. *Pertinent Supreme Court Decisions*.

Although the Supreme Court summarily affirmed the decision of the three-judge district court in *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C.), *summarily aff'd per curiam sub nom.*, *Coit* v. *Green*, 404 U.S. 997 (1971), the question whether racially discriminatory private schools are entitled to tax exemption under Section 501(c)(3) remains open in the Supreme Court. First, it is well established that a summary affirmance by the Supreme Court, while affirming the *judgment* appealed from, does not constitute an endorsement of the lower court's *reasoning*. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1976); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring). Moreover, the Court has explicitly noted that the Commissioner's adoption of the district court's decision and reasoning robbed the appeal to the Supreme Court of an adversarial controversy and thus robbed the Supreme Court's summary affirmance of precedential weight. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974); Prince Edward School Foundation v. United States, _____ U.S. _____, 101 S. Ct. 1408 n.1 (1981) (Rehnquist, J., joined by Stewart and Powell, J.J., dissenting from denial of certiorari).

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[14] Although *Green* v. *Connally* was affirmed per curiam by the Supreme Court, *Coit* v. *Green*, 404 U.S. 997 (1970), the Court subsequently has stated that this affirmance lacks precedential weight. *Bob Jones University* v. *Simon*, 416 U.S. 725, 740 n.11 (1974).

Nor does the case relied upon by the district court in Green--Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958)--govern the issue raised in Bob Jones University and Goldsboro Christian Schools. The issue in Tank Truck was whether fines imposed on owners of tank trucks for violations of state maximum weight laws are deductible by the truck owners as "ordinary and necessary" business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (now Section 162(a) of the 1954 Code). Reasoning that deductibility of the fines would frustrate state policy in a severe and direct fashion by reducing the "sting" of the penalties, the Supreme Court ruled that "[a] finding of 'necessity' cannot be made . . . if allowance of the deduction would frustrate sharply defined national or state policies prescribing particular types of conduct, evidenced by some governmental declaration thereof." 356 U.S. at 34. Unlike the explicit limitation placed by Congress on the deductibility of business expenses (i.e., that they be "ordinary and necessary"), tax-exempt status under Section 501(c)(3) is accorded to "corporations . . . organized . . . for . . . educational purposes" simpliciter, not just educational organizations deemed by the Commissioner as "necessary" or otherwise worthy of favored tax treatment.[15/]

Moreover, even if the "public policy" requirement for tax deductions under Section 162(a) applied to tax exemptions under Section 501(c)(3), it is clear that neither Bob Jones nor Goldsboro could be denied tax-exempt status. "[T]he test of nondeductibility always is the severity and immediacy of the frustration resulting from allowance of the deduction." Id.

15/ Indeed, even in the context of "ordinary and necessary" business expenses under Section 162(a), the Supreme Court has made clear that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined." Commissioner v. Tellier, 383 U.S. 687, 694 (1966). As the Tellier Court noted:

> We start with the proposition that the Federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes. Id. at 691.

In the absence of specific legislation denying deductibility to certain types of business expenses, "it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principle [of deductibility] reflected in [previous] decisions. Id. at 693-94.

at 35; accord Commissioner v. Tellier, 383 U.S. 687, 694 (1966). Because allowance of the deduction sought in Tank Truck "would but encourage continued violations of state law by increasing the odds in favor of noncompliance," the Supreme Court concluded that deduction of fines imposed by the state would "frustrate state policy in a severe and direct fashion." 356 U.S. at 35-36. As the district court in Bob Jones University found, however, permitting tax-exempt status to [Bob Jones] does not so act as to encourage [Bob Jones] to discriminate on the basis of race. [Bob Jones'] racial views result from sincerely held religious beliefs. Regardless of [Bob Jones'] tax status, its religious beliefs remain immutable." Pet. App. at A62.

As the foregoing discussion demonstrates, the interpretation of Section 501(c)(3) adopted by the Commissioner, the district court in Green, and the Court of Appeals for the Fourth Circuit is not supported, much less compelled, by any decision of the Supreme Court. Accordingly, the Commissioner is free to reverse his earlier rulings denying tax-exempt status to private nonprofit educational organizations that would qualify under 501(c)(3) but for their racially discriminatory practices.

E. Constitutional Considerations.

In affirming the Service's authority to deny tax-exempt status to racially discriminatory private educational institutions, the Court of Appeals in Bob Jones University hinted that its interpretation of Section 501(c)(3) was driven, at least in part, by constitutional considerations. Citing Norwood v. Harrison, 413 U.S. 455 (1973), the Court stated: "The Constitution commands that government not provide any form of tangible assistance to schools which discriminate on the basis of race. . . . [G]overnment must 'steer clear' of affording significant tax support to educational institutions that practice racial discrimination." Pet. App. All at n.7. The Court of Appeals' analysis of the equal protection implications of according exempt status to racially discriminatory private schools is simply wrong.

First, the Court of Appeals' conclusion is premised on the notion that a tax exemption--or, in other words, a failure to tax--constitutes "tangible assistance" flowing from the Government directly to the educational institution. The Supreme Court, in the context of the Establishment Clause of the First Amendment, has rejected a similar argument, noting that "[t]he grant of a tax exemption is not sponsorship since the Government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the State." Walz v. Tax Commission, 397 U.S. 664, 675 (1970).

Second, and more importantly, the Supreme Court has never held that the mere knowing provision of funds (much less tax exemption) to an entity that discriminates is a violation of the Constitution's equal protection guaranties. Rather, the Equal Protection Clause is violated only if the Government funding had the purpose and effect of significantly facilitating, supporting, or reinforcing the racially discriminatory behavior. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979); Washington v. Davis, 426 U.S. 229, 239-244 (1976).[16/]. Moreover, the inquiry into discriminatory purpose does not hinge on the foreseeability of the legislation's discriminatory effects. Rather, discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its" discriminatory effects. Personnel Administrator of Massachusetts v. Feeney, supra, 442 U.S. at 279. Obviously, Congress did not accord tax-exempt status under Section 501(c)(3) to "educational" organizations "because" such a tax exemption would benefit racially discriminatory private schools. Rather, the most that can be said is that Congress sought to advance the cause of education

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[16/] Norwood v. Harrison, supra, is not to the contrary, having arisen in the context of state and municipal programs in Mississippi that "benefitted private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems." Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 163 (1978). See also Gilmore v. City of Montgomery, 417 U.S. 556, 568, 570-71 n.10. To the extent that the Court's decision in Norwood can be read to reject the proposition that discriminatory purpose is a necessary element of a constitutional violation, it should be noted that Norwood was decided prior to the Court's ruling in Washington v. Davis, supra, which held unequivocally to the contrary.

in an of itself and acted "in spite of" the fact that racially discriminatory private schools would incidentially be benefitted thereby.

Because Bob Jones' and Goldsboro's racially discriminatory practices stem from sincerely held religious beliefs, the Service's construction of Section 501(c)(3) to deny them tax-exempt status raises serious questions under the Establishment and Free Exercise Clauses of the First Amendment. As the Supreme Court held in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 501 (1979), in the absence of clear congressional intent, a federal statute should be construed to avoid having to "resolve difficult and sensitive questions arising out of the guaranties of the First Amendment Religion Clauses." See also St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. ___, 101 S. Ct. 2142, 2147 (1981). A reversal of the Service's position in Bob Jones University and Goldsboro Christian Schools would serve the dual purposes of harmonizing the Service's interpretation of Section 501(c)(3) with the congressional intent of that statue and avoiding a confrontation between Section 501(c)(3) and the First Amendment.

CONCLUSION

From the foregoing, it is clear that the Service's interpretation of Section 501(c)(3) of the 1954 Code is at odds with the statute's language and legislative history and renders the statute of questionable constitutionality in the circumstances of these cases. Accordingly, the Service should reverse its position in Bob Jones University and Goldsboro Christian Schools and accord tax-exempt status to both schools.

TAB S

Inter-Office Memorandum

☐ ACTION ☐ BRIEFING ☐ INFORMATION

Date: January 5, 1982

For: DEPUTY SECRETARY MCNAMAR

From: Ann Dore McLaughlin ADMcL

Subject: Bob Jones Decision

We recommend the following strategy for announcing the Bob Jones decision:

1. Release of the following documents: Press Release including statement by the Deputy Secretary, chronology of legal history of both cases, and a copy of Justice's motion to the Court in both cases.

2. File the motions at 4:00 p.m. with simultaneous release of press documents.

3. Hold a background briefing at 4:00 p.m. for legal reporters on key national publications including the New York Times, Washington Post, Wall Street Journal, Atlanta Journal-Constitution and Los Angeles Times. Participants to include: Deputy Secretary McNamar, Treasury General Counsel, and a Justice Department official, probably Brad Reynolds. ?

Strategy:

1. At 4:00 p.m. release of documents allows time for wire service stories to meet a.m. newspaper deadlines and make 6:00 p.m. evening television broadcasts. Release of your statement at 4:00 p.m. insures that the first wire stories out -- and thus the most widely used, especially by the broadcast media -- will contain our rationale. An earlier release would give the media more time to conduct interviews with interest groups and thus politicize the story. A later release -- one too late for the evening TV news -- might cause the networks to hold the story until the next day, which would result in the same kind of expanded political story.

	Initiator	Reviewer	Reviewer	Reviewer	Reviewer
Surname	FITZWATER				
Initials/Date	1/5 MF	/	/	/	/

OS F 10-01.2 (6-77) which replaces OS 3275 which may be used until stock is depleted.

2. The initial press release would stimulate wire service stories under the most controlled situation. The background briefing would allow us to flesh out the stories in the best light possible.

3. Justice suggests keeping the National Alliance decision separate.

cc: Secretary Regan
Roscoe Egger
Peter Wallison

TAB T

OFFICE OF
THE SOLICITOR GENERAL

1/5/81

Ken,

These 2 revised pages show that the 1976 legislative history is stronger then shown in the draft you received.

Also (fn, p. 43) the Supreme Court in *Bob Jones* was wrong in what it said about *Green* being non-adversary in the Supreme Court.

Larry

OFFICE OF
THE SOLICITOR GENERAL

DEPARTMENT OF JUSTICE

Re: Goldsboro-
Bob Jones

1/5/82

Ed,

These 2 revised pages show the pertinent 1976 legislative history more clearly & specifically.

Larry Wallace

The development I need to tell you about is related to amicus filings on our side of the case.

OFFICE OF
THE SOLICITOR GENERAL

DEPARTMENT OF JUSTICE

Re: Goldsboro -
Bob Jones

1/5/82

Bruce,

These 2 revised pages show the pertinent 1976 legislative history with greater specificity. I have also given a copy to [illegible] the Deputy.

Larry Wallace

TAB U

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

January 7, 1982

MEMORANDUM FOR: Dave Gergen
Director of Communications
White House

Tom DeCair
Director, Public Affairs
Justice Department

From: Ann Dore McLaughlin ADMcL
Assistant Secretary
(Public Affairs)

Subject: Bob Jones Decision

Attached is a press release which lays out our rationale for the Bob Jones decision. Although it is still an open question whether the release should come from Treasury or Justice, following is the suggested strategy for the release:

1. Release of the following documents: Press Release including statement by the Deputy Secretary, chronology of the legal history of the case, and a copy of Justice's motion to the Court.

2. File the motion at 4:00 p.m. with simultaneous release of press documents.

3. Hold a background briefing at 4:00 p.m. for legal reporters on key national publications including the New York Times, Washington Post, Wall Street Journal, Atlanta Journal-Constitution and Los Angeles Times. Participants to include: Deputy Secretary McNamar, Treasury General Counsel, and a Justice Department official, probably Brad Reynolds.

Strategy

This is a relatively low-key strategy with maximum control of the story's content. However, because of the complexities of the case the background session with key reporters is probably a necessary ingredient.

Attachment

TAB V

CHIEF COUNSEL
Internal Revenue Service
Washington, DC 20224

January 7, 1982

William Bradford Reynolds, Esq.
Assistant Attorney General
Civil Rights Division
United States Department of Justice
Washington, D.C. 20530

Dear Brad:

While we still have not received definitive instructions to reverse our position in the Bob Jones and Goldsboro cases, I have reviewed your draft of the motion to dismiss in order to give you our comments should the decision to file be made in the near future. My principal concern is that unintended and unforeseen effects on the administration of section 501(c)(3) be avoided. Specifically, I am concerned that the first paragraph on page 2 could be read to invalidate Treasury's adoption of the common law definition of "charitable" in the 1959 regulations under section 501(c)(3). Accordingly, I would propose that the attached paragraph be substituted for the first paragraph on page 2. Hopefully, this language meets your requirements on the "public policy" issue while preserving our authority to grant exemption for trusts to maintain public buildings or lessen the burdens of government and similar situations.

Very truly yours,

Kenneth W. Gideon

Attachment

Department of the Treasury

TAB W

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

18 JAN 1982

MEMORANDUM TO THE ATTORNEY GENERAL
AND THE DEPUTY ATTORNEY GENERAL

Re: *Bob Jones University v. United States* - No. 81-3
Goldsboro Christian School v. United States - No. 81-1

In connection with your consideration of the issues which have arisen relative to the above-captioned litigation, I have certain additional observations. As I mentioned yesterday, I have not had time to thoroughly research the merits of the central issue concerning the meaning of §§ 501(c)(3) and 170(a) and (c)(2) of the Internal Revenue Code. Therefore, I have no firm conclusion on the merits, but you have received advice from an ample number of people that do. I would simply like to add the following thoughts:

1. *The Legislative History During the 1970's.* During the numerous debates in 1979, 1980 and 1981 with respect to the Ashbrook/Dornan Amendments which restricted IRS enforcement efforts to policies and regulations developed prior to August of 1978, various Congressmen made statements on the record concerning their understanding of existing law. The following are representative samples of statements made by supporters (except as noted) of the Ashbrook/Dornan Amendments:

(a) Congressman Ashbrook, July 13, 1979, Congressional Record - H 5882
"My amendment in no way will preclude them from making additions or revisions in the permanent law and for at least 1 year we will have kept the IRS from going forward with their August 27, 1978, regulations. This is what I am trying to do, not to say they cannot issue regulations of

any kind. As I pointed out, under their current regulation 7450 [S.C. 74-50], they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away." (Emphasis added.)

(b) Congressman Sensenbrenner, July 13, 1979, Congressional Record - H 5883

"So in sum and substance, Mr. Chairman, the regulations are purely and simply a form of harassment against the private schools of this country. The regulations that were in effect prior to August of last year or the proposals of last year were very adequate in revoking the tax exempt status of those schools that did discriminate. No one complained that they were inadequate until somebody down at the IRS came up with the proposed regulations." (Emphasis added)

(c) Congressman Grassley, July 13, 1979, Congressional Record - H 5884

"This is not to suggest that the goals of the IRS are entirely wrong. Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions." (Emphasis added)

(d) Congressman Hammerschmidt, July 13, 1979, Congressional Record - H 5884

"This is not an issue of race. In 1979 the IRS announced that racially discriminatory schools, who did not maintain an open door policy must forfeit their tax exempt status and as a result of this action by the IRS over 100 schools lost their tax exempt status. That action was sufficient and there is no need for regulations of this magnitude and expense." (Emphasis added)

(e) Congressman Dickinson, July 13, 1979, Congressional Record - H 5885

"At the present time, IRS has more than adequate authority to strip away the tax-exempt status of private schools that practice racial discrimination and I know this authority has been used effectively in a number of cases. The intelligent and sensible thing to do would be to leave it at that." (Emphasis added)

(f) Congressman Dornan, August 19, 1980, Congressional Record - H 7209

"The IRS already has sufficient authority to deal with private tax-exempt schools which discriminate because of race." (Emphasis added)

(g) Congressman Rangel, (opposing the Dornan Amendment), August 19, 1980, Congressional Record - H 7211

"Now we find that the courts have responded, and they responded specifically not only to the proposed regulations but to the constitutional obligations that we not fund schools that involved themselves in racial discrimination; and certainly no Member of the House, including the proponents of this amendment, would support that." (Emphasis added)

(h) Congressman Ashbrook, July 30, 1981, Congressional Record - H 5395-96

"I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1979, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS's ability to withdraw the tax-exempt status of any school which might violate the law." (Emphasis added)

(i) Congressman Lott, July 30, 1981,
Congressional Record - H 5397
"The IRS remains free to deny exemptions to any school proven guilty of discrimination, and I have no doubt they will continue to enforce that standard as vigorously as they have in the past." (Emphasis added)

(j) Congressman Lott, July 30, 1981,
Congressional Record - H 5398
"If this amendment passes, the IRS will still be free to investigate charges of racial discrimination. It will be free to deny exemptions to any institution proven guilty of racial discrimination through fair hearings. In short, it will be free to enforce the regulations and court orders in effect in 1978." (Emphasis added)

2. Legislative History Regarding §501(c)(7).

The addition of the prohibition of a tax exemption for discriminatory social clubs occurred in 1976. The Senate Report (No. 94-1318) referred to the court decision which had held that discrimination on account of race by a social club was not prohibited by the Constitution. The Report referred to the understanding of the Committee on Finance of the United States Senate that "discrimination on account of race is inconsistent with an educational institution's tax exempt status . . ." p. 8. The report goes on to state that "In view of national policy, it is believed that it is inappropriate for a social club . . . to be exempt from income taxation if its written policy is to discriminate on account of race, color or religion." This bit of legislative history, which has been cited by the Office of the Solicitor General, is the type of legislative enactment, giving explicit recognition to what the Congress apparently believed to be the existing law concerning educational institutions, which is given considerable weight by the courts in statutory interpretation.

3. Principles of Statutory Construction.

The discussion in the Reynolds memoranda of principles of statutory construction is relatively brief. I believe that that discussion does not accurately state the principles which have been enunciated repeatedly and recently by the Supreme Court. Needless to say, no principle of statutory construction can be sufficiently dispositive of such an issue if the Court cannot be convinced that the principles of construction are in accord with the true intent of the legislature. Therefore, I offer these observations not because they dispose of the issue, but because I believe that the law on this subject is not adequately discussed in the Reynolds memoranda. The following citations are simply samples of what the Supreme Court has said on this subject in contexts which are somewhat analogous to the instant issue.

> (a) Haig v. Agee, 49 LW 4869 (1981) ("[C]ongressional acquiesence may sometimes be found from nothing more than silence in the face of an administrative policy."; "despite the long-standing and officially promulgated view that the Executive had the power to withhold passports for reasons of national security and foreign policy, Congress, in 1978, 'though it once again enacted legislation relating to passports, left completely untouched the broad lawmaking authority granted in the earlier act.'").
>
> (b) Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction. Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.")
>
> (c) Lorillard v. Pons, 434 U.S. 575 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . ."; "so, too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); and

(d) Saxbe v. Bustos, 419 U.S. 65 (1974) ("This long-standing administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the act and left the practice untouched. Such a history of administrative construction and Congressional acquiesence may add a gloss or qualification to what is on its face unqualified statutory language.")

As I mentioned at the outset, I am not suggesting that the legislative history discussed above and the rules of statutory construction mentioned above are dispositive. This is a complicated issue and there has not been time, unfortunately, to review this in a manner which is consistent with the importance of the decision being made. I did feel, however, that the material set forth herein provides at least some counterweight to the materials which you are presently reviewing in connection with these issues.

Theodore B. Olson
Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

cc: ✓Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Kenneth W. Starr
Counselor to the Attorney General

TAB X

THE DEPUTY SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20220

MEMORANDUM FOR COMMISSIONER EGGER

Subject: Tax-Exemption for Bob Jones University and Goldsboro Christian Schools, Inc.

This memorandum is to confirm the Department's direction to you to begin the process of granting Bob Jones University and Goldsboro Christian Schools, Inc. tax-exempt status under section 501(c)(3) of the Internal Revenue Code.

After much consideration and having the benefit of discussions with you and the Department of Justice, I have decided as a policy and legal matter that the Internal Revenue Service is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy.

Therefore, I am directing you to take the necessary steps to reverse the previous decisions of the Internal Revenue Service in denying tax-exempt status to Bob Jones University and Goldsboro Christian Schools, Inc. It is my understanding that in order to accomplish this, you will also have to revoke the applicable revenue rulings under which you denied these institutions tax-exempt status and refund to them Federal social security and unemployment taxes. These steps should be taken as soon as legally possible.

R. T. McNamar

TAB Y

CURRENT
PROPOSED
TO BE FILED
Wednesday

(5)

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

GOLDSBOREO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the Court of Appeals' decision upholding Internal Revenue Service regulations that were applied to deny them tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 and sister Code provisions regarding federal social security taxes (Section 3121(b)(8)(B) of the Code), federal unemployment taxes (Section 3306(c)(8) of the Code), and the deductibility of charitable contributions (Section 170(a) and (c) of the Code) because of certain racially discriminatory practices of petitioners. In the courts below and in our Memorandun in opposition to the petitions for writs of certiorari, the United States argued tht the Commissioner of Internal Revenue acted within his statutory authority in determining that Congress intended to deny petitioners tax-exempt status under the Internal Revenue Code. After closely reexamining the challenged regulations and the Internal Revenue Code provisions on which the regulations are based, the United states has concluded that this position and the Court of Appeals' decision were in error.

Generally speaking, Congress employs the Internal Revenue Code for revenue raising or other fiscal and economic purposes. On rare occasions, Congress has employed the Code to foster civil rights policies that it has estabished in a comprehensive network of civil rights laws. Congress has been unequivocal and explicit, however, when it has taken this course, as in denying tax-exempt status to social clubs that practice racial discrimination. (cite).

Congress has addressed problems of racial and other forms of discrimination in a networks of laws providing both public and private remedies for violations. For example, Congress has in various statutes invested private individuals with power to challenge acts of racial discrimination practiced by private institutions such as petitioners. See, for example, 42 U.S.C. §1981-1982; Jones v. Mayer; Runyon v. McCrary. The United States, however, has concluded that the absence of any civil rights purpose in the explicit language and legislative history of Section 501(c)(3) of the Internal Revenue Code demonstrates the lack of authority in the Commissioner to unilaterally impose nondiscrimination requirements on organizations that would otherwise qualify as tax-exempt under that statute. Whether or not such nondiscrimination requirements should be engrafted onto Section 501(c)(3) is a question entrusted by the Constitution to the Congress.

Accordingly, the United States hereby confesses error in its previous interpretation of the Internal Revenue Code as investing the Commissioner of Internal Revenue with authority to declare ineligible for tax-exempt status organizations that engage in racially discriminatory practices. The Commissioner intends to grant petitioner Goldsboro tax-exempt status under Section 501(c)(3) of the Code, and will refund to it federal social security and unemployment taxes in dispute. The Commissioner also intends to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Commissioner has instituted procedures to revoke the regulations (26 C.F.R.) that were employed to deny petitioners tax exempt status under the Code. Accordingly, the United States suggests that the cases in Nos. 81-1 and 81-3 be dismissed as moot and that the judgments of the Court of Appeals be vacated.

TAB Z

53

TREASURY NEWS

epartment of the Treasury • Washington, D.C. • Telephone 566-2041

FOR IMMEDIATE RELEASE
Friday, January 8, 1982

Contact: Marlin Fitzwater
(202) 566-5252

TREASURY ESTABLISHES NEW TAX-EXEMPT POLICY

The Treasury Department announced today that without further guidance from Congress, the Internal Revenue Service will no longer revoke or deny tax-exempt status for religious, charitable, educational or scientific organizations on the grounds that they don't conform with certain fundamental public policies.

"In the past," said Deputy Treasury Secretary R. T. McNamar, "the IRS has revoked the tax exemptions of organizations which, did not adhere to certain fundamental national policies, such as those forbidding discrimination on the basis of race, even though this requirement is not explicitly stated in the Internal Revenue Code except in the case of social clubs."

"Whether or not the Treasury Department or this Administration agrees with the position of the IRS in particular cases is not the issue," McNamar stated. "The question is whether the IRS is required under the Code as enacted by Congress to decide -- as a condition to granting or continuing tax-exempt status -- whether private organizations conform with fundamental national policies. The Treasury Department has concluded that this kind of judgment -- which may mean life or death for certain organizations -- is fundamentally a question for Congress; and if the authority to make this judgment is given by Congress to an administrative agency it should be done in explicit terms and subject to specific guidelines."

As a consequence of this decision, the IRS will restore the tax exemption of certain organizations which had previously been revoked. In particular, the appeal of Bob Jones University, and the Goldsboro Schools, which are currently before the Supreme Court will be rendered moot.

"In taking this action," McNamar stated, "we are attempting to protect the independence of all private tax-exempt organizations -- many of which may follow practices and adhere to principles with which we disagree. But before the government gets into the business of deciding which organizations are worthy of tax exemption and which are not, we want Congress to fully consider the implications of such a course."

The Treasury Department decision reflects the advice of the Department of Justice that the authority which the IRS previously had been asserting as its basis for revoking the tax exemptions in question is not supported by the language of the Internal Revenue Code or its legislative history. The Internal Revenue Code provides tax exemptions for "Corporations (or other organizations) organized and operated exclusively for religious, charitable, scientific ... or educational ... purposes ...." IRC Section 501(c)(3), 26 U.S.C. Section 501(c)(3). The Justice Department has advised that both the language of Section 501(c)(3) and the statute's legislative history provide no support for the statutory interpretation adopted by the Commissioner in 1970. Thus the IRS is without legislative authority to deny tax-exempt status to otherwise eligible organizations on the grounds that their policies or practices do not conform to notions of national public policy.

This new policy is reflected in a motion filed with the Supreme Court today by the Justice Department to vacate a case in which the Internal Revenue Service revoked the tax-exempt status of Bob Jones University and Goldsboro Christian Schools. IRS revoked the Bob Jones University tax exemption in 1970 on the grounds that the school's racial policies violated Federal policies on racial discrimination. This decision was nullified by the U.S. District Court in South Carolina on June 30, 1971. However, the lower court's decision was reversed by the 4th Circuit Court of Appeals on December 30, 1980.

Similarly in 1974 the IRS determined that Goldsboro Christian Schools Inc. did not qualify for an exemption on the grounds that it maintained a racially discriminatory admissions policy. On May 7, 1980 the District Court for the Eastern district of North Carolina upheld the IRS decision. On February 24, 1981 the Court of Appeals for the 4th Circuit affirmed this judgement period.

Both schools appealed the Circuit Court decision to the Supreme Court which accepted their petitions for certiorari on October 13, 1981.

TAB AA

UNITED STATES TAX COURT

INDIANOLA EDUCATIONAL)
FOUNDATION, INC.)
)
PETITIONERS,)
)
v.) Docket No. 27705-81X
)
COMMISSIONER OF INTERNAL)
REVENUE)
)
RESPONDENT)

MOTION TO EXTEND TIME WITHIN WHICH TO FILE ANSWER

THE RESPONDENT MOVES, that the Court extend the time within which to answer this petition from January 11, 1982 to March 12, 1982.

IN SUPPORT THEREOF, the respondent respectfully shows unto the Court:

1. The petition in this case was served on the Office of Chief Counsel on November 12, 1981 and the time to answer the petition provided for by Tax Court Rules of Practice and Procedure 36 expires January 11, 1982.

2. By a news release dated January 8, 1982, a copy of which is attached hereto as Exhibit "A", the Treasury Department announced that the Department of Justice was asking the Supreme Court to vacate the cases of *Goldsboro, Christian Schools, Inc. v. United States*, Dkt. No. 81-1 (U.S. Sup. Ct.) and *Bob Jones University v. United States*, Dkt. No. 81-3 (U.S. Sup. Ct.). The memorandum filed by the Department of Justice, a copy of which is attached hereto as Exhibit "B", advised the Supreme Court that the Treasury Department was initiating steps to revoke certain existing Revenue Rulings and Revenue Procedures dealing with the

racial policies of private schools which claim to be exempt under I.R.C. § 501(c)(3).

3. The revocation action in this case arose in connection with a revised injunction order issued by the United States District Court against the Secretary of the Treasury and the Commissioner of Internal Revenue in Green v. Regan, Civil No. 1355-69 (D.D.C.). At issue in this declaratory judgment proceeding is petitioner's qualification as a tax exempt organization, with particular reference to petitioner's adoption and maintenance of racially nondiscriminatory policies.

4. In light of the news release issued by the Treasury Department on January 8, 1982, and the memorandum filed with the Supreme Court in Goldsboro Christian Schools and Bob Jones University, the respondent requires additional time in which to consider his position on the issue present in this case.

5. Respondent has contacted by telephone Graham Stafford, counsel for the petitioner, who orally has not agreed to the extension requested by this motion.

WHEREFORE, it is prayed that this motion be granted.

KENNETH W. GIDEON
Chief Counsel
Internal Revenue Service

Dated: 11 JAN 1982

By: s/ [illegible]
MICHAEL F. PATTON
Attorney
Tel. No. (202) 566-3378

[illegible]
STEPHEN M. MILLER
Assistant Deputy Chief Counsel
(Litigation)
1111 Constitution Ave., N.W.
Washington, D.C. 20224
Tel. No. (202) 566-7936

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Motion to Extend Time Within Which to File Answer was served on Petitioner, Indianola Educational Foundation, by mailing the same on this date in a postage-paid wrapper to its counsel, Graham Stafford, Esq., McGlinchey, Stafford & Mintz (A Professional Law Corporation) Lafayette Place, Camp and Capdevielle Streets, P.O. Box 2000, New Orleans, Louisiana 70176.

This is to further certify that the original of the foregoing Motion was sent to the United States Tax Court in a postage-paid wrapper on this date.

Dated: 11 JAN 1982

s/ Michael F. Patton
MICHAEL F. PATTON

Nos. 81-1 and 81-3

In the Supreme Court of the United States

OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to them, because of certain racially discriminatory practices, to deny tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) ("Code") and sister Code provisions regarding federal social security taxes

(Section 3121(b)(8)(B) of the Code) and federal unemployment taxes (Section 3306(c)(8) of the Code), and to deny them status as eligible donees of charitable contributions under Section 170(a) and (c) of the Code.

Since the filing of our Brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code.[1]

The United States therefore asks that the judgments of the court of appeals be vacated as moot.

Respectfully submitted.

LAWRENCE G. WALLACE
*Acting Solicitor General**

JANUARY 1982

---

[1] The applicable rulings are Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

*The Solicitor General is disqualified in these cases.

Nos. 81-1 and 81-3

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER
v.
UNITED STATES OF AMERICA

BOB JONES UNIVERSITY, PETITIONER
v.
UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

LAWRENCE G. WALLACE
Acting Solicitor General

Department of Justice
Washington, D. C. 20530

EXHIBIT B

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-1

GOLDSBORO CHRISTIAN SCHOOLS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

No. 81-3

BOB JONES UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This Court granted writs of certiorari in the above-captioned cases and ordered consolidation on October 13, 1981. Petitioners seek reversal of the court of appeals' decisions upholding Internal Revenue Service rulings that were applied to them, because of certain racially discriminatory practices, to deny tax-exempt status as "religious" or "educational" institutions under Section 501(c)(3) of the Internal Revenue Code of 1954 ("Code") and sister Code provisions regarding federal social security taxes (Section 3121(b)(8)(B) of the Code) and federal unemployment taxes (Section 3306(c)(8) of the Code), and to deny them status as eligible donees of charitable contributions under Section 170(a) and (c) of the Code.

Since the filing of our brief acquiescing in the granting of certiorari in these cases, the Department of the Treasury has initiated the necessary steps to grant petitioner Goldsboro Christian Schools tax-exempt status under Section 501(c)(3) of the Code, and to refund to it federal social security and unemployment taxes in dispute. Similarly, the Treasury Department has initiated the necessary steps to reinstate tax-exempt status under Section 501(c)(3) of the Code to petitioner Bob Jones University, and will refund to it federal social security and unemployment taxes in dispute. Finally, the Treasury Department has commenced the process necessary to revoke forthwith the pertinent Revenue Rulings that were relied upon to deny petitioners tax exempt status under the Code. 1/

The United States therefore asks that the judgments of the court of appeals be vacated as moot.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

JANUARY 1982

1/ The applicable rulings are Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Proc. 72-54, 1972-2 Cum. Bull. 834; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587.

TAB BB

THE WHITE HOUSE
WASHINGTON

CABINET MEETING AGENDA

January 12, 1982 -- 2:00 p.m.

1.	Tax Exemptions for Private Institutions	The President
2.	Federal Labor Relations Policy	Don Devine

CABINET MEETING PARTICIPANTS

Tuesday, January 12, 1982 -- 2:00 p.m.

The Cabinet -- All Members *

- * Walter Stoessel, Deputy Secretary of State-Designate for Secretary Haig
- * Donald P. Hodel, Under Secretary of the Interior for Secretary Watt
- * Richard E. Lyng, Deputy Secretary of Agriculture for Secretary Block
- * Joseph Wright, Deputy Secretary of Commerce for Secretary Baldrige
- * Charles Lichenstein, Alternate Representative to the United Nations for Ambassador Kirkpatrick

James A. Baker
Michael K. Deaver
Martin Anderson
Richard G. Darman
Kenneth Duberstein
Craig L. Fuller
David Gergen
Edwin L. Harper
Murray Weidenbaum
Rich Williamson
Larry Speakes
Daniel Murphy
Karen Hart

For Presentations:

Donald J. Devine, Director
Office of Personnel Management

Joseph Morris, General Counsel
Office of Personnel Management

Guests in attendance:

Mary Anne Wood, White House Fellow, DOD

David K. Karnes, White House Fellow, HUD

TAB CC

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release January 12, 1982

STATEMENT BY THE PRESIDENT

This issue of whether to deny tax exemptions to non-profit, private, educational institutions raises important questions and sensitive policy considerations.

My administration is committed to certain fundamental views which must be considered in addressing this matter:

-- I am unalterably opposed to racial discrimination in any form. I would not knowingly contribute to any organization that supports racial discrimination. My record and the record of this administration are clear on this point.

-- I am also opposed to administrative agencies exercising powers that the Constitution assigns to the Congress. Such agencies, no matter how well intentioned, cannot be allowed to govern by administrative fiat. That was the sole basis of the decision announced by the Treasury Department last Friday. I regret that there has been a misunderstanding of the purpose of the decision.

I believe the right thing to do on this issue is to enact legislation which will prohibit tax exemptions for organizations that discriminate on the basis of race.

Therefore, I will submit legislation and will work with the Congress to accomplish this purpose.

###

TAB DD

Memorandum

38

Subject	Date
Tax-Exempt Private School Litigation	January 13, 1982 JFM:mas

To

Edward C. Schmults
Deputy Attorney General

From

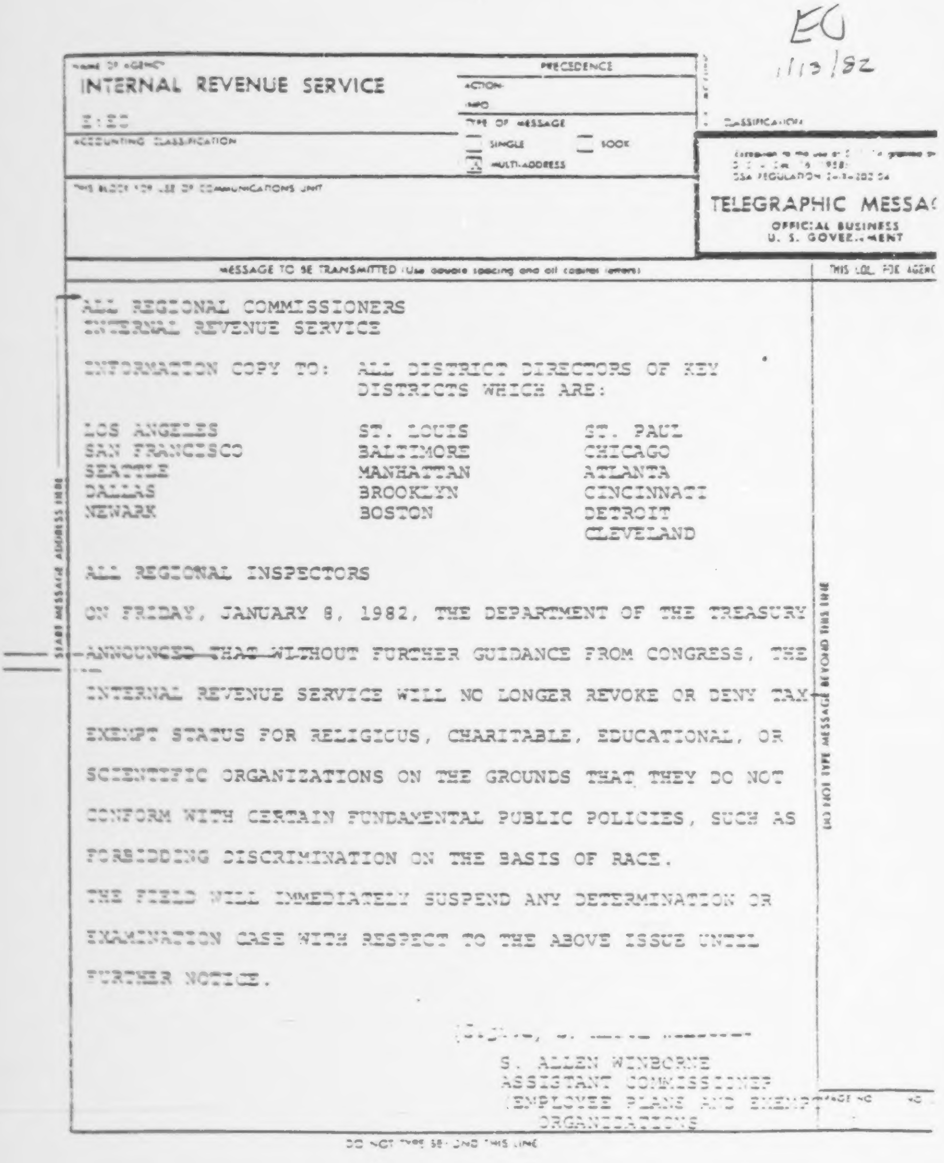
John F. Murray
Acting Assistant Attorney General
Tax Division

Attached please find a copy of certain pleadings filed today by plaintiffs' attorneys in *Green* v. *Regan* (D.C. D.C.), the suit brought by the parents of black Mississippi schoolchildren to enjoin the Commissioner of Internal Revenue from continuing in existence tax exemptions for private schools with discriminatory admissions policies. Essentially, plaintiffs contend that the policy pronouncement reflected in the January 8 Memorandum filed in the Supreme Court in the *Bob Jones* and *Goldsboro* cases violates the outstanding declaratory judgment and permanent injunctions entered in the *Green* case. Accordingly, plaintiffs request the Court to vacate its outstanding January 6 Order staying all proceedings until final decisions in *Bob Jones* and *Goldsboro*, and requiring defendants to respond in three days to the request for further injunctive relief prohibiting revocation of certain specified Revenue Rulings and Revenue Procedures setting forth the racially nondiscriminatory requirements as to private schools. Plaintiffs also specifically request the Court to prohibit defendants from restoring the tax-exempt status of any Mississippi private school whose exemption was withdrawn as a result of the earlier *Green* decrees.

Representatives of the Tax Division will be meeting with officials of Internal Revenue Service and Treasury either tomorrow or Friday to discuss and formulate a proposed reply.

Attachment

TAB EE



EO
1/13/82

NAME OF AGENCY
INTERNAL REVENUE SERVICE
E:EO

PRECEDENCE
ACTION
INFO
TYPE OF MESSAGE
☐ SINGLE ☐ BOOK
☒ MULTI-ADDRESS

CLASSIFICATION

ACCOUNTING CLASSIFICATION

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GSA REGULATION 2-3-202.04
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OFFICIAL BUSINESS
U. S. GOVERNMENT

MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)

THIS COL. FOR AGENC

START MESSAGE ADDRESS HERE

ALL REGIONAL COMMISSIONERS
INTERNAL REVENUE SERVICE

INFORMATION COPY TO: ALL DISTRICT DIRECTORS OF KEY DISTRICTS WHICH ARE:

LOS ANGELES
SAN FRANCISCO
SEATTLE
DALLAS
NEWARK
ST. LOUIS
BALTIMORE
MANHATTAN
BROOKLYN
BOSTON
ST. PAUL
CHICAGO
ATLANTA
CINCINNATI
DETROIT
CLEVELAND

ALL REGIONAL INSPECTORS

ON FRIDAY, JANUARY 8, 1982, THE DEPARTMENT OF THE TREASURY ANNOUNCED THAT WITHOUT FURTHER GUIDANCE FROM CONGRESS, THE INTERNAL REVENUE SERVICE WILL NO LONGER REVOKE OR DENY TAX-EXEMPT STATUS FOR RELIGIOUS, CHARITABLE, EDUCATIONAL, OR SCIENTIFIC ORGANIZATIONS ON THE GROUNDS THAT THEY DO NOT CONFORM WITH CERTAIN FUNDAMENTAL PUBLIC POLICIES, SUCH AS FORBIDDING DISCRIMINATION ON THE BASIS OF RACE.

THE FIELD WILL IMMEDIATELY SUSPEND ANY DETERMINATION OR EXAMINATION CASE WITH RESPECT TO THE ABOVE ISSUE UNTIL FURTHER NOTICE.

[illegible]

S. ALLEN WINBORNE
ASSISTANT COMMISSIONER
(EMPLOYEE PLANS AND EXEMPT
ORGANIZATIONS

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TAB FF

97th Congress, 2d Session - - - - - - - House Document No. 97-132

TAX-EXEMPT STATUS OF CERTAIN SCHOOLS

COMMUNICATION

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A DRAFT OF PROPOSED LEGISLATION TO AMEND THE INTERNAL REVENUE CODE OF 1954 TO PROHIBIT THE GRANTING OF TAX-EXEMPT STATUS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES

JANUARY 25, 1952.—Referred to the Committee on Ways and Means ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
89-011 O WASHINGTON : 1982

The White House,
Washington, January 18, 1982.

Hon. Thomas P. O'Neill, Jr.,
The Speaker,
The House of Representatives, Washington, D.C.

Dear Mr. Speaker: As you are aware, the Department of the Treasury announced on January 8 that the Internal Revenue Service would no longer deny tax-exempt status to private, non-profit educational organizations that engage in racially discriminatory practices but otherwise qualify for such status under the present Internal Revenue Code. That decision reflects my belief that agencies such as the IRS should not be permitted, even with the best of intentions and to further goals that I strongly endorse, to govern by administrative fiat by exercising powers that the Constitution assigns to the Congress.

I share with you and your colleagues an unalterable opposition to racial discrimination in any form. Such practices are repugnant to all that our Nation and its citizens hold dear, and I believe this repugnance should be plainly reflected in our laws. To that end, I am herewith submitting to the Congress proposed legislation that would prohibit tax exemptions for any schools that discriminate on the basis of race. This proposed legislation is sensitive to the legitimate special needs of private religious schools.

I pledge my fullest cooperation in working with you to enact such legislation as rapidly as possible, and urge that you give this matter the very highest priority.

I have been adivsed by the Secretary of the Treasury that he will not act on any applications for tax exemptions filed in response to the IRS policy announced on January 8, until the Congress has acted on this proposed legislation.

I believe the course I have outlined is the one most consistent both with our mutual determination to eradicate all vestiges of racial discrimination in American society, and with a proper view of the powers vested in the Congress under our constitutional system.

I feel this legislative action is important to and desired by all citizens of this great Nation; I am confident that you will give this issue the prompt attention it deserves.

Sincerely,

Ronald Reagan.

January 18, 1982.

Tax Exemption Bill Summary

The proposed legislation being submitted by the President to the Congress will, for the first time, give the Secretary of the Treasury and the Internal Revenue Service express authority to deny tax-exempt status to private, non-profit educational organizations with racially discriminatory policies. The legislation recognizes and is sensitive to the legitimate special needs of private religious schools.

Section 1 of the bill adds to section 501 of the Internal Revenue Code a new subsection that expressly prohibits granting tax exemptions to private schools with racially discriminatory policies, notwithstanding that such schools otherwise meet the tests for exemption presently listed in section 501(c)(3).

Religious schools of all faiths are permitted to limit, or give preferences and priorities, to members of a particular religious organization or belief in their admissions policies or religious training and worship programs. However, the bill expressly provides that a tax exemption will not be granted if any such policy, program, preference or priority is based upon race or a belief that requires discrimination on the basis of race.

Section 2 of the bill amends several sections of the Internal Revenue Code dealing with deductions to provide, consistent with the exemption provisions of the new law, that no deductions will be allowed for contributions to a school with a racially discriminatory policy.

A BILL To amend the Internal Revenue Code of 1954 to prohibit the granting of tax-exempt status to organizations maintaining schools with racially discriminatory policies

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. DENIAL OF TAX EXEMPTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

Section 501 of the Internal Revenue Code of 1954 (relating to exemption from tax) is amended by redesignating subsection (j) as subsection (k) and inserting a new subsection (j) reading as follows:

"(j) ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.—

"(1) IN GENERAL.—An organization that normally maintains a regular faculty and curriculum (other than an exclusively religious curriculum) and normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on shall not be deemed to be described in subsection (c)(3), and shall not be exempt from tax under subsection (a), if such organization has a racially discriminatory policy.

"(2) DEFINITIONS.—For the purposes of this subsection—

"(i) An organization has a 'racially discriminatory policy' if it refuses to admit students of all races to the rights, privileges, programs, and activities generally accorded or made available to students by that organization, or if the organization refuses to administer its educational policies, admissions policies, scholarship and loan programs, athletic programs, or other programs administered by such organization in a manner that does not discriminate on the basis of race. The term 'racially discriminatory policy' does not include an admissions policy of a school, or a program of religious training or worship of a school, that is limited, or grants preferences or priorities, to members of a particular religious organization or belief: *Provided,* That no such policy, program, preference, or priority is based upon race or upon a belief that requires discrimination on the basis of race.

"(ii) The term 'race' shall include color or national origin.',

SECTION 2. DENIAL OF DEDUCTIONS FOR CONTRIBUTIONS TO ORGANIZATIONS MAINTAINING SCHOOLS WITH RACIALLY DISCRIMINATORY POLICIES.

(a) Section 170 of the Internal Revenue Code of 1954 (relating to allowance of deductions for certain charitable, etc., contributions and gifts) is amended by adding at the end of subsection (f) a new paragraph (7) reading as follows:

"(7) Denial of Deductions for Contributions to Organizations Maintaining Schools With Racially Discriminatory Policies.--No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(b) Section 642 of such Code (relating to special rules for credits and deductions) is amended by adding at the end of subsection (c) a new paragraph (7) reading as follows:

"(7) Denial of Deductions for Contributions to Organizations Maintaining Schools With Racially Discriminatory Policies.—No deduction shall be allowed under this section for any contribution to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(c) Section 2055 of such Code (relating to the allowance of estate tax deductions for transfers for public, charitable, and religious uses) is amended by adding at the end of subsection (e) a new paragraph (4) reading as follows:

"(4) No deduction shall be allowed under this section for any transfer to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

(d) Section 2522 of such Code (relating to charitable and similar gifts) is amended by adding at the end of subsection (c) a new paragraph (3) reading as follows:

"(3) No deduction shall be allowed under this section for any gift to or for the use of an organization described in section 501(j)(1) that has a racially discriminatory policy as defined in section 501(j)(2)."

SECTION 4. EFFECTIVE DATE.

The amendments made by this Act shall apply after July 9, 1970.

○

TAB GG

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

January 29, 1982

Honorable Dan Rostenkowski
Chairman
Committee on Ways & Means
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

By letter dated January 26, 1982, we forwarded to you copies of documents concerning the court cases of Bob Jones University and Goldsboro Christian Schools. As a supplement to the documents accompanying that letter, I am enclosing an Analysis of Legal Authorities for Possible Inclusion in a Brief.

Sincerely,

Robert A. McConnell /maw

Robert A. McConnell
Assistant Attorney General

Enclosure

January 29, 1982

ANALYSIS OF LEGAL AUTHORITIES FOR POSSIBLE INCLUSION IN A BRIEF

QUESTION PRESENTED: Has Congress authorized the Internal Revenue Service's ruling that a private school does not qualify as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 if it engages in racially discriminatory practices?

Pending before the Supreme Court on writs of certiorari are Bob Jones University v. United States, No. 81-3, and Goldsboro Christian Schools, Inc. v. United States, No. 81-1, in which petitioners, bona fide religious or educational institutions, challenge decisions of the Fourth Circuit Court of Appeals sustaining the asserted authority of the Commissioner of Internal Revenue to deny petitioners tax-exempt status under Section 501 (c)(3) of the Internal Revenue Code of 1954 because of racially discriminatory practices. The argument that Congress has directed the denial of tax-exempt status to private educational institutions that practice racial discrimination is not persuasively supported by either the language or the legislative history of Section 501(c)(3).

STATUTE INVOLVED

Sections 501(a) and (c)(3) of the Internal Revenue Code (1971) (26 U.S.C. §§501(a) and (c)(3) (1971)) provide in pertinent part:

> Sec. 501. Exemption from tax on corporations, certain trusts, etc.
>
> (a) Exemption from taxation. -- An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> (c) List of exempt organizations. -- The following organizations are referred to in subsection (a):
>
> (3) Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

FACTUAL AND PROCEDURAL BACKGROUND

A. Bob Jones University - No 81-3

1. Petitioner Bob Jones University ("Bob Jones") is a nonprofit organization incorporated in 1952 under the laws of South Carolina "for the general education of youth in the essentials of culture and in the arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures . . . ." Bob Jones provides instruction for students from kindergarten through college and graduate school, enrolling more than 5,000 students and offering more than 50 accredited degrees in secular subjects. All courses are taught in accordance

with the dictates of Biblical Scripture. Teachers are required to be "born again" Christians, and students are examined as to their religious beliefs and their conduct is strictly regulated.

Bob Jones maintains a racially restrictive policy forbidding its students to engage in interracial dating and interracial marriage. This policy is based upon the belief that God intended the various races to live apart, and that intermarriage of different races is contrary to God's will and to the Scriptures. Prior to 1971, Bob Jones excluded blacks entirely from enrollment. From 1971 until 1975, married blacks and members of other minority races or ethnic groups were not excluded from enrollment, but Bob Jones continued to deny admission to unmarried blacks unless the applicant had been a staff member of Bob Jones for at least four years. See Bob Jones University v. Johnson, 396 F. Supp. 597, 600 & n.9 (D.S.C. 1974), aff'd without published opinion, 529 F.2d 514 (4th Cir. 1975). At that time it was the school's judgment that, while a policy of excluding blacks altogether was not doctrinally required, denying admission to unmarried blacks was the best means of implementing Bob Jones' prohibition against interracial dating and marriage.

In response to decisions of the court of appeals in Bob Jones University v. Johnson, 529 F.2d 514 (4th Cir. 1975), and of the Supreme Court in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), aff'd, 427 U.S. 160 (1976), Bob Jones revised its admissions policy to permit unmarried blacks as well as married blacks to matriculate. It continued to deny admission, however, to any applicant known to be a partner in an interracial marriage, and it established disciplinary rules requiring the expulsion of any student (1) who was a partner in an interracial marriage, (2) who was affiliated with a group or organization advocating interracial marriage, (3) who engaged in interracial dating, or (4) who encouraged others to violate Bob Jones' rules and prohibitions against interracial dating. The University required each student to attend a "rules meeting" at which the several disciplinary rules were reviewed, and further required each student to sign a statement promising to abide by these racial restrictions.

2. Prior to 1970, the Internal Revenue Service recognized Bob Jones as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 ("1954 Code") (26 U.S.C. §501(c)(3)). See Bob Jones University v. Simon, 416 U.S. 725, 735 (1974). On July 10, 1970, the Service announced that it would no longer accord tax-exempt status under Section 501 to private schools maintaining racially discriminatory policies, and that it would not continue to treat gifts to such schools as deductible contributions under Section 170. 1/ See Rev. Rul. 71-447, 1971-2 Cum. Bull. 230.

1/ The Service's interpretation of Section 501(c)(3) was spurred by litigation. In Green v Connally, 330 F. Supp. 1150 (D.D.C. 1971), summarily aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997 (1971), parents of black public school students sued to enjoin the United States from according tax-exempt status under Section 501(c)(3) to private schools in Mississippi that discriminated against blacks. The Service initially took the position that racially segregative private schools were entitled to tax exemption under Section 501 (c)(3), but reversed its legal view before the case was appealed to the Supreme Court. The Court's summary affirmance of Green thus "lacks the precedential weight of a case involving a truly adversary controversy," and leaves open the question of whether a racially discriminatory private school is eligible for tax exemption under Section 501(c)(3). Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974).

In November 1970, the Service sent letters to approximately 5,000 organizations operating private schools, including Bob Jones, announcing its new policy and requesting proof of nondiscriminatory admissions practices. Bob Jones responded that it did not admit black students and, in September, 1971, further stated that it had no intention of altering that policy. The Service therefore commenced administrative proceedings leading to the revocation of Bob Jones' tax exemption and of its advance assurance of deductibility.

In January 1976, after the University's attempt to enjoin the administrative proceedings had failed in the Supreme Court, see Bob Jones University v. Simon, 416 U.S. 735 (1974), the Service issued a final notice of revocation, effective as of December 1, 1970.

3. Seeking to reinstate its previous 28-year exemption, Bob Jones initiated suit in the United States District Court for the District of South Carolina for refund of $21 in federal unemployment taxes for the year 1975. 2/ The government counterclaimed for approximately $490,000 in federal unemployment taxes for the years 1971 through 1975. Following a trial, the district court held that Bob Jones qualified for tax exemption under Section 501(c)(3) of the 1954 Code as an institution organized

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2/ Petitioner's qualification for an exemption from federal unemployment taxes (FUTA) under 26 U.S.C. §3306(c)(8) turns on its entitlement to status as a tax-exempt organization under Section 501(c)(3). See Bob Jones University v. Simon, supra, 416 U.S. at 727-728.

and operated exclusively for religious and educational purposes, and that the University was not required to demonstrate a nondiscriminatory racial policy in order to so qualify. 468 F. Supp. 890 (D.S.C. 1978).

The district court explained that Section 501(c)(3) does not endow the IRS with authority to discipline wrongdoers or to promote social change by denying exemptions to organizations that offend federal public policy. Voicing apprehension over such broad power, the district court observed: "Federal public policy is constantly changing. When can something be said to become federal public policy? Who decides? With a change of federal public policy, the law would change without congressional action--a dilemma of constitutional proportions. Citizens could no longer rely on the law of §501(c)(3) as it is written, but would then rely on the IRS to tell them what it had decided the law to be for that particular day. Our laws would change at the whim of some nonelected IRS personnel, producing bureaucratic tyranny." _Id_. at 905.

By a 2-1 margin, the Fourth Circuit Court of Appeals reversed the district court's holding that Bob Jones was entitled to tax-exempt status because it is a religious institution and qualifies under the enumerated "religious" and "educational" categories of Section 501(c)(3). _Bob Jones University v. United States_, 639 F.2d 147 (1980). Relying on the three-judge district court's decision in _Green v. Connally_, 330 F. Supp. 1150 (D.D.C.), _summarily aff'd per curiam sub nom. Coit v. Green_, 404 U.S. 997

(1971), the majority agreed with the Internal Revenue Service that Section 501(c)(3) must be interpreted as incorporating the common law of charitable trusts as a gloss on each of the separately enumerated exemptive purposes in the statute. The panel majority further agreed with the Green conclusion (330 F. Supp. at 1156-60) that to be eligible for tax-exempt status under Section 501(c)(3), "an institution must be 'charitable' in the broad common law sense, and therefore must not violate public policy." Id. at 151.

The majority also relied on a 1939 House Report explaining the theory animating Congress to confer tax exemptions on organizations devoted to charitable and other purposes to buttress the conclusion that Section 501(c)(3) establishes a public policy test:

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from other public funds, and by the benefits resulting from the promotion of the general welfare.

H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19 (1939). Because Bob Jones' discriminatory practices violated clearly defined public policy, rooted in the Constitution, federal prohibitions against federal assistance to racially discriminatory schools, and a federal statute, 42 U.S.C. § 1981, proscribing private acts of racial discrimination, the court of appeals held that "the Service acted within its statutory authority in revoking [petitioner's] tax exempt status. . . ." Id. at 152.

In so doing, the majority rejected Bob Jones' argument that application of the Service's nondiscrimination policy to it violates the Free Exercise Clause of the First Amendment, noting that the Service's policy would neither prohibit Bob Jones from adhering to its teachings nor force any individual student to violate his beliefs. With respect to Bob Jones' Establishment Clause claim, the majority concluded that "the uniform application of the [Service's] rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." *Id.* at 155 (emphasis in original).

Judge Widener dissented, concluding that "Bob Jones University is a religious organization" within the meaning of Section 501(c)(3), and that the majority, the Service, and the district court in *Green v. Connally*, *supra*, had misconstrued Section 501 (c)(3) by insisting that each of the eight types of organizations identified in the statute as tax-exempt must also be "charitable" organizations under the common law of charitable trusts *Id.* at 156. Section 501(c)(3), Judge Widener observed, grants tax-exempt status to each class of organization enumerated in the statute, and because Bob Jones falls within one of those classes ("religious"), the IRS lacked authority to deny the exemption granted by Congress. *Id.* at 158. Judge Widener further asserted that the public policy favoring freedom of religion may not be subordinated to the public policy against racial discrimination in the context of private, non-tax-funded religious institutions.

B. Goldsboro Christian Schools - No. 81-1

1. Petitioner Goldsboro Christian Schools, Inc. ("Goldsboro"), is a North Carolina nonprofit organization incorporated in 1963 "to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures * * *." At least since 1969, Goldsboro has maintained a regularly enrolled student body (750 students in 1973-74) for kindergarten and grades one through twelve, and has satisfied the requirements of North Carolina for secular education in private schools. Submissions to the State indicate that Goldsboro requires its high school students to take one Bible-related course during each semester. In keeping with Goldsboro's overall purpose and with the desire of its founders to provide a secular private school education in a religious setting, Goldsboro's practice is to begin each class with a prayer.

Based upon its interpretation of the Bible, Goldsboro has maintained a racially discriminatory admissions policy since the time of its incorporation. The policy reflects a belief that God intended a "separation of the nations and races" and that it is necessary to discourage "any kind of social intermingling by * * * students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God."

2. Pursuant to the Service's 1970 nondiscrimination ruling, the Commissioner determined that Goldsboro did not

qualify for exemption from federal social security taxes (FICA) under Section 3121(b)(8)(B) of the Code, or for exemption from federal unemployment taxes (FUTA) under Section 3306(c)(8) of the Code and, in 1974, assessed FICA and FUTA taxes against it.

3. After making partial payment, Goldsboro instituted suit in the United States District Court for the Eastern District of North Carolina seeking a refund of $3,459.93 of withheld federal social security and unemployment taxes for 1969 through 1972. The government counterclaimed for $160,073.96 in taxes for that period. On the parties' cross motions for summary judgment, the district court ruled that the Service had properly denied Goldsboro tax-exempt status under Section 501(c)(3) and the tax benefits associated with qualification as a Section 501(c)(3) organization, because its racially discriminatory admissions policy violated the declared public policy of the United States. By a 2-1 margin, the Fourth Circuit Court of Appeals affirmed. Finding the case "identical" to the Bob Jones University case, the court of appeals majority upheld the denial on the authority of Bob Jones University. See Goldsboro Christian Schools, Inc. v. United States, No. 80-1473 (4th Cir., Feb. 24, 1980). Judge Field dissented for the reasons stated by Judge Widener in his dissenting opinion in Bob Jones University.

DISCUSSION

The central legal question presented by these cases is whether Congress authorized the IRS to deny tax-exempt status under Section 501(c)(3) to nonprofit private educational institutions that discriminate on the basis of race. Subsidiary legal questions are whether, in the event that no such authority exists in the statute, Section 501(c)(3) tax exemptions provided to educational institutions that practice racial discrimination violate either the Constitution or Title VI of the 1964 Civil Rights Act. A review of the objective evidence of legislative intent leads to the conclusion that Congress did not authorize the IRS to deny tax-exempt status in the circumstances described. Nor can we find any support in the Constitution or Title VI of the 1964 Civil Rights Act for withholding tax exemptions to private educational institutions that discriminate on the basis of race.

A. Statutory Language

The search for congressional intent must, of course, begin with the words of the statute to be construed. *See*, *e.g.*, *Northwest Airlines, Inc. v. Transport Workers Union*, ___ U.S. ___, 101 S.Ct. 1571, 1580 (1981); *United States v. Oregon*, 366 U.S. 643, 48 (1961). Section 501(c)(3) exempts from taxation "[c]orporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, *or* educational purposes, *or* for the prevention of cruelty to children or animals . . . ." 26 U.S.C. §501(c)(3) (1971) (emphasis supplied). In order to construe this language to require a denial of tax-exempt status to educational institutions such as Bob Jones and Goldsboro, one must conclude (1) that Congress intended all eight classes of organizations listed in Section 501(c)(3) to qualify as "charitable" and (2) that Congress used the term "charitable" in Section 501(c)(3) in its common law sense--that is, in the sense that an organization cannot qualify as "charitable" if its purposes or practices violate public policy. See Green v. Connally, supra, 330 F.Supp. at 1157. Neither conclusion is permissible.

By its very terms, the statutory enumeration of eight purposes or functions entitling nonprofit corporations to tax-exempt treatment is framed in the disjunctive by use of the connector "or." As a consequence, Congress manifested an intent to accord tax-exempt status to any organization organized and operated for any one of the enumerated purposes or functions. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise."). The distinct references in Section 501(c)(3) to "educational" or "charitable" organizations confirms "Congress' intent that not all educational institutions must also be charitable institutions (as that term was used in the common law) in order to receive tax-exempt status." Prince Edward School Foundation v. United States, __ __U.S. __ ___, 101 S.Ct. 1408, 1409 (1981) (Rehnquist, J., joined by Stewart and Powell, J. J., dissenting from denial of certiorari).

This interpretation of the language of Section 501(c)(3) assigns to the words used by Congress their ordinary meaning. It is reinforced by the settled canon of statutory construction requiring that related statutory provisions be interpreted in para materia. 2A Sutherland, Statutory Construction, §46.05 at 56-57 (4th ed. 1973). Sections 503, 504, and 513 of the Code, sister provisions of Section 501(c)(3), reiterate the separate and disjunctive purposes or functions described in Section 501 (c)(3), thereby suggesting that each enumerated category provides an independent "basis for . . . exemption under Section 501(a)." See 26 U.S.C. §§ 503(b)(3), 504(a)(1) & (3), and 513(a). Prior to 1969, Section 503 denied tax-exempt status to organizations otherwise qualified under Section 501(c)(3) if they engaged in certain prohibited transactions. 3/ Section 503(b) provided, in pertinent part:

> This Section shall apply to any organization described in section 501(c)(3) . . . except --
>
> (1) a religious organization . . .;
>
> (2) an educational organization . . .;
>
> (3) an organization which normally receives a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501(a)) from the United States or any State or political subdivision thereof or from direct or indirect contributions from the general public; . . . [emphasis supplied]

3/ References to organizations described in Section 501(c)(3) were deleted from Section 503 in 1969.

The language underscored above, which also appeared in the pre-1969 version of Section 504(a)(1) and (3) 4/ and appears in the current version of Section 513(a), 5/ substantiates Congress' intent (1) that "charitable" purposes be viewed as separate and distinct from "educational" purposes and any other "purpose or function" enumerated in Section 501, and (2) that each purpose or function constitutes a sufficient and independent basis for exemption under Section 501(a).

Regulations promulgated by the Internal Revenue Service also reflect an interpretation of the statutory language as

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4/ Section 504(a)(1) and (3) provided for the denial of tax-exempt status to any organization whose retained income during the taxable year is

> unreasonable in amount or duration in order to carry out the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3); or . . . (3) invested in such a manner as to jeopardize the carrying out of the charitable, educational or other purpose or function constituting the basis for exemption under Section 501(a) of an organization described in Section 501(c)(3).

Substantially identical language was contained in Section 3814 of the 1939 Internal Revenue Code. This Section 504 was repealed by Congress in 1969. P.L. 91-172, §101(j)(15).

5/ Section 513(a) provides, in pertinent part, that the term "unrelated trade or business" in the context of Section 511 (which imposes a tax on unrelated business income of otherwise tax-exempt organizations) means "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under Section 501 (or, . . . to the exercise or performance of any purpose or function described in Section 501(c)(3)), . . ." Substantially identical language appeared in Section 422(b) of the 1939 Internal Revenue Code.

affording tax-exempt status to any organization qualifying under one of the categories enumerated in Section 501(c)(3), without regard to whether it also accords with the characteristics of a common law charity. Under Section 1.501(c)(3)-1(d)(1)(i) of the regulations, an organization may be exempt "if it is organized and operated exclusively for one or more of the following purposes: (a) Religious, (b) Charitable, (c) Scientific, (d) Testing for public safety, (e) Literary, (f) Educational, or (g) Prevention of cruelty to children or animals." 26 C.F.R. §1.501 (c)(3)-1(d)(1)(i) (emphasis supplied). The regulations state further that

> since each of the purposes specified in subdivision (i) of this subparagraph is an exempt purpose in itself, an organization may be exempt if it is organized and operated exclusively for any one or more of such purposes . . . . For example, if an organization claims exemption on the ground that it is "educational", exemption will not be denied if, in fact, it is "charitable".

26 C.F.R. §1.501(c)(3)-1(d)(1)(iii) (emphasis supplied).

Nonetheless, the Fourth Circuit Court of Appeals read Section 501(c)(3) to provide tax-exempt status only to institutions that are organized and operated for one of the designated purposes and are also qualified as a common law charity. In support of this interpretation of Section 501(c)(3), the court cited Section 170 of the Code, which it asserted, "places the separately enumerated purposes in [§ 501(c)(3)] under the broad heading of 'charitable' and permits deduction of contributions made to organizations serving those purposes." 639 F.2d at 151 n.6.

Congress, however, has directed that caption headings in the Code be ignored in construing tax provisions. See 26 U.S.C. §7806(b). In addition, the terms of Section 170 contradict the court's construction of Section 501(c)(3).

Subsection (c) of Section 170 defines "charitable contributions" in relevant part as follows:

> (c) Charitable contribution defined. -- For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of --
>
> > (2) A corporation, trust, or community chest, fund, or foundation --
> >
> > > (B) Organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . or for the prevention of cruelty to children or animals; . . .

26 U.S.C. §170 (1971) (emphasis supplied). The definition of the term "charitable contribution" relates solely to Section 170, and it is defined partly in terms of the purposes for which certain organizations are organized and created, namely, "religious, charitable, scientific, literary, or educational [or specified other] purposes." These distinct purposes each qualify an organization to receive "charitable contributions." Section 170 thus provides no support for an interpretation of Section 501 (c)(3) that requires every institution qualifying for receipt of a "charitable contribution" to operate as a common law charity. 6/

6/ Moreover, if all organizations which receive "charitable contributions" were required to conform to common law notions of charity, the requirement of Section 170(c)(2)(C) that no part of the earnings of an organization which receives "charitable contributions" may "inure [] to the benefit of any private shareholder or individual," would be superfluous. See p. 2, supra.

Thus, the statutory language of Section 501)(c)(3) and its sister provisions, the structure of the Code, and the Service's interpretive regulations require the conclusion that Congress intended to afford tax-exempt status to any organization organized and operated exclusively for any one of the purposes or functions enumerated in Section 501(c)(3).

There is yet another reason that compels this conclusion. Even if one assumes that Congress intended all tax-exempt organizations to qualify as "charitable" under Section 501(c)(3), it is doubtful that Congress used the term "charitable" in its common law sense. As Lord McNaughten observed in Commissioners of Income Tax v. Pemsel, [1891] A.C. 531, 583, the word "charitable" at common law encompassed "trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." Had Congress intended the word "charitable" to have its common law meaning, separate references in Section 501(c)(3) to "educational" and "religious" organizations would have been unnecessary, for the latter two terms would have been included in the first. Such an interpretation of the word "charitable" in Section 501(c)(3) would thus betray a fundamental axiom of statutory construction: statutes are to be construed to give effect to each word, and no one part of a statute should be interpreted so as to render another part of the statute redundant. Jarecki v. G.D. Searle & Company, 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

The Service followed this axiom during the initial period of Section 501(c)(3)'s history and, accordingly, interpreted "charitable" in its "popular and ordinary sense" rather than its common law sense. In 1923, the Service stated in I.T. 1800, II-2 C.B. 152, 153, that the word "charitable" as used in Section 231(6) of the Revenue Acts of 1918 and 1921 (Section 501(c)(3)'s predecessor) means "relief of the poor": 7/

> It will be seen that "charitable" in this broad sense includes, among other things, education, religion, relief of the poor, social service, and civil or public benefactions. On the other hand, "charitable" in its popular and ordinary sense pertains to the relief of the poor. . . .
>
> In Section 231(6) of the Revenue Acts of 1918 and 1921 the organizations enumerated are religious, charitable, scientific, literary, and educational. . . . It seems obvious that the intent must have been to use the word "charitable" in Section 231(6) in its more restricted and common meaning and not to include either religious, scientific, literary, educational, civil, or social welfare organizations. Otherwise, the word "charitable" would have been used by itself as an all-inclusive term, for in its broadest sense it includes all of the specific purposes enumerated. That the word "charitable" was used in a restricted sense is also shown from its position in the section. The language is "religious, charitable

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7/ That the Service promulgated this interpretive regulation temporally near to the initial enactment of the early revenue statutes entitles it to special deference. An agency's interpretive regulation is due particular respect when it reflects a contemporaneous statutory construction. Power Reactor Development Company v. Electricians, 367 U.S. 396, 408 (1961). See NLRB v. Boeing Company, 412 U.S. 67, 75 (1973) ("a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference . . . "). See also discussion in text at pp. 26-27, infra.

scientific, literary, or educational . . . ." (Emphasis supplied). 8/

Based on the foregoing, the conclusion compelled by the language of the statute is inescapable: Congress expressed its intent clearly in the words of Section 501(c)(3), exempting from income taxation "educational" organizations that are not also "charitable" as surely as it exempted "charitable" organizations that are not also "educational." The contrary reading of the legislation by the Fourth Circuit is plainly incorrect.

This does not suggest in any way a disagreement with the court's underlying premise that the practice of racial discrimination by an institution deserves the harshest condemnation. In seeking, however, to achieve justifiable and laudatory ends, it is crucial that the government not employ means that trench upon fundamental principles firmly embedded in the Constitution that divides national power among three distinct branches of government. The Constitution assigns legislative power to the Congress, and neither the courts nor administrative agencies have "the

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8/ The uncertainty that would be generated in the tax law by granting exemptions to any entity organized "for purposes beneficial to the community," Commissioners of Income Tax v. Pemsel, supra, may explain why Congress chose to enumerate specifically certain types of organizations deemed worthy of tax exemption without regard to whether they qualified as common law charities. To do otherwise would have exposed organizations otherwise qualifying for tax-exempt status under Section 501(c)(3) to unforeseeable changes in public mores or values. For example, in 1844, Justice Story suggested that a school organized to teach Judaism cannot be considered charitable. Vidal v. Girard Ex'rs, 43 U.S. (2 How.) 127, 198-201 (1844); see Neuberger & Crumpler, Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration, 48 Fordham L. Rev. 229 (1979).

power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather, it is their function to give the natural and plain meaning and effect to statutes as passed by Congress." *National Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975).

B. *Legislative History*

Although the clarity of the language used by Congress in Section 501(c)(3) makes an examination of the statute's legislative history unnecessary, *see*, *e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 199, 201 (1976); *United States v. Oregon*, 366 U.S. 643, 648 (1961), a review of that history does not warrant the construction of Section 501(c)(3) endorsed by the Commissioner and the Fourth Circuit Court of Appeals in *Bob Jones University*.

The exemptions from taxation now contained in Section 501 (c)(3) originated as a part of the Tariff Act of 1894, 28 Stat. 556, 9/ which provided in pertinent part: [N]othing herein contained shall apply to corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes." There is no indication in the legislative history that Congress incorporated or had reference to the "common law of charitable trusts" in enacting this taxing statute.

9/ This corporate income tax act was later declared unconstitutional by the Supreme Court in *Pollock v. Farmer's Loan & Trust Company*, 158 U.S. 601 (1895).

After ratification of the Sixteenth Amendment, Congress passed the Tariff Act of 1913, ch. 16, § II, 38 Stat. 114, 166. Section II(G)(A) exempted from the income tax:

> [A]ny corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholders or individual.

This legislation broadened the 1894 exemption to include "scientific" corporations, and added the requirement that in order for a corporation to be exempt from taxation, no part of its net earnings could inure to the benefit of any private stockholder or individual. Under the common law, however, income of a charity could not inure to the benefit of a private person. See 4A Scott, The Law of Trusts § 376 (2d ed. 1956). Thus, the inclusion of a requirement to that effect in the statute would have been unnecessary if Congress had intended to condition tax exemption on satisfying the requirements of a common law charity.

The conclusion that Congress did not intend to incorporate the common law of charitable trusts into the exemption is further supported by the Service's contemporaneous construction of the early revenue acts. In a ruling issued in 1921, the Service stated that charitable trusts were not exempt from taxation under the predecessor provisions of Section 501(c)(3) contained in the Revenue Acts of 1913, 1916 and 1918. A.R.M. 104, 4 C.B. 262 (1921). This position was also advanced in the regulations promulgated under the Revenue Act of 1918. Treas. Reg. 45, Art. 517 (Revenue Act of 1918).

In subsequent revenue acts, Congress continued to broaden the list of exempt purposes. The Revenue Act of 1918, ch. 254, § 231(6), 40 Stat. 1057, expanded the list of exempt corporations to include those organized "for the prevention of cruelty to children or animals." The Revenue Act of 1921, ch. 98, § 231(6), 42 Stat. 227, further expanded the statute to exempt "any community chest, fund or foundation" and added "literary" organizations to the list of exempt purposes. These additions would have been unnecessary had Congress intended to use the word "charitable" in its broad common law sense. Moreover, as previously discussed, supra at 16-19, in 1923 the Service interpreted the word "charitable" in Section 231(6) of the Revenue Acts of 1918 and 1921 in its "popular and ordinary sense" as meaning "relief of the poor," rather than in its broader common law sense.

The exemption from taxation contained in the Revenue Act of 1921 remained unchanged in the Revenue Acts of 1924, 1926, 1928 and 1932, 10/ and regulations issued by the Service under those acts continued to define the term "charitable" to mean "relief of the poor." Treas. Reg. 65, Art. 517 (Revenue Act of 1924). "Corporations organized and operated exclusively for

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10/ Revenue Act of 1924, ch 176, § 231(6), 43 Stat. 253; Revenue Act of 1926, ch. 20, § 231(6), 44 Stat. 9; Revenue Act of 1928, ch. 562, § 103(6), 45 Stat. 791; Revenue Act of 1932, ch. 154, § 103(6), 47 Stat. 169.

charitable purposes comprise, in general, organizations for the relief of the poor." 11/

The Revenue Act of 1934, ch. 216, § 101(6), 48 Stat. 680, carried forward unchanged the exemption provision of prior revenue acts, but added the requirement that no substantial part of the activities of an exempt organization could involve the "carrying on of propaganda" or "attempting to influence legislation." Once again, the addition of this requirement would have been unnecessary if Congress had intended for all organizations to qualify as common law charities in order to be exempt from taxation. See 4A Scott, The Law of Trusts § 374.6 (2d ed. 1956).

The Revenue Act of 1936, ch. 740, § 101(6), 49 Stat. 1648, and the Revenue Act of 1938, ch. 554, § 101(6), 52 Stat. 447, also carried forward the same exemption, and the regulations promulgated under these Acts continued to define the term "charitable" as "relief of the poor." See Treas. Reg. 86, Art. 101(6)-1 (Revenue Act of 1934); Treas. Reg. 94, Art. 101(6)-1 (Revenue Act of 1936); Treas. Reg. 101, Art. 101(6)-1 (Revenue Act of 1938).

11/ Treas. Reg. 69, Art. 517 (Revenue Act of 1926); Treas. Reg. 74, Art. 527 (Revenue Act of 1928); Treas. Reg. 77, Art. 527 (Revenue Act of 1932).

In the Internal Revenue Code of 1939, ch. 1, 53 Stat. 1 ("1939 Code"), Congress exempted from taxation the identical categories of organizations that had been exempt from taxation under the Revenue Acts of 1934, 1936 and 1938. During the fifteen years in which the 1939 Code remained in effect, the IRS issued three sets of regulations, each of which defined the term "charitable" to mean relief of poverty. See Treas. Reg. 103, §19.101(6)-1 (1939 Code); Treas. Reg. 111, §29.101 (6)-1 (1939 Code); Treas. Reg. 118, §39.101(6)-1(b) (1939 Code). 12/

Section 501(c)(3) of the 1954 Code, ch. 591, 68A Stat. 163, continued to exempt the same categories of organizations that had been exempt from taxation under the 1939 Code, and added to the list of exempt entities those organizations which are organized and operated for the purpose of "testing for public safety."

12/ The House Report to the 1939 Act explained that the theory for granting tax exemptions by Congress to charitable and other qualifying organizations was in recognition of their performance of functions that promote the general welfare and that might otherwise be paid by the government. Contrary to the Fourth Circuit's suggestion in Bob Jones University, supra, 639 F.2d at 151, the Report does not indicate that Congress intended to endow the IRS with authority to disqualify a designated organization from tax-exempt status upon an agency determination that one or more of the organization's practices affronted an IRS concept of federal public policy as informed by the "general welfare." To the contrary, Congress made a determination that organizations within the terms of Section 501(c)(3) advanced the general welfare, and did not give the IRS authority to determine on a case-by-case basis whether particular practices of a qualifying organization sufficiently subtracted from the general welfare to warrant denial of a tax exemption.

In addition, Congress tightened the restrictions on political activities of tax-exempt organizations. 13/

The Report of the House Ways and Means Committee on the 1954 Code stated that Section 501 "is derived from Sections 101 and 421 of the 1939 Code. *No change in substance has been made* except that employees' pension trusts, etc., are brought in the scope of this section." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A165 (1954) (emphasis supplied).

Not until 1959 did the Internal Revenue Service broaden its interpretation of "charitable" beyond merely "relief of the poor." In Section 1.501(c)(3)-1(d)(2) of its 1959 regulations, the Service concluded:

> The term "charitable" is used in Section 501 (c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. . . .

13/ The 1954 Code does not permit tax-exempt organizations to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Obviously, the purpose of this regulation is to clarify that the meaning of "charitable" is not "limited by the separate enumeration in Section 501(c)(3) of other tax-exempt purposes"; for to so limit the term would render it redundant in the statute. The regulation does not suggest organizations devoted to other purposes enumerated in Section 501(c)(3), such as "educational" and "religious" purposes, must also serve "charitable" purposes. Indeed, the same regulation defines "educational" without any reference to the notion of charity:

> The term "educational", as used in Section 501(c)(3), relates to --
>
> > (a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or
> >
> > (b) The instruction of the public on subjects useful to the individual and beneficial to the community.

26 C.F.R. § 1.501(c)(3)-1(d)(3) (1959). 14/

14/ To the extent that the Service's regulations can be interpreted to require "educational" organizations to also satisfy the requirements of "charitable" organizations, they are inconsistent with the plain language of Section 501(c)(3) and are suspect. The Supreme Court outlined the limits of the Executive's interpretive powers in Manhattan General Equipment Company v. Commissioner, 297 U.S. 129, 130 (1935):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law--for no such power can be delegated by Congress--but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Under the Service's interpretive regulations, private schools plainly qualify as "educational" institutions entitled to tax-exempt status under Section 501(c)(3), notwithstanding any racially discriminatory practices.

Since 1894, Congress has consistently and repeatedly manifested an intent to exempt from income taxation corporations organized for purely "educational" purposes, as well as corporations organized for purely "charitable" purposes. The action of Congress is inconsistent with an intent to deny tax-exempt status to an otherwise qualified "educational" organization simply because it does not also qualify as a common law "charitable" organization.

Significantly, the Commissioner of Internal Revenue did not read Section 501(c)(3) and its predecessors any differently until 1970--some 70 years after Congress' initial enactment of the relevant statutory language. To the contrary, prior to its sudden reversal of position in the middle of the Green litigation, the government had steadfastly maintained the position demanded by the unambiguous language of Section 501(c)(3), its legislative history, and the Service's own interpretative regulations. So belated an administrative reversal of position provides no legal basis for ascribing to a much earlier Congress an intent at odds with the very words used by Congress. 15/ Here, the original legislative intent

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15/ Obviously, the Commissioner's 1970 revenue ruling is not even arguably a contemporaneous construction of the statute by those presumed to be aware of congressional intent " National Muffler Dealers Assn. v. United States, 440 U.S. 472, 477 (1979).

is clear, and it must prevail until amended or altered by explicit congressional action.

C. Congressional Action Subsequent to 1970

It is arguably appropriate to examine Congressional action subsequent to the Commissioner's 1970 change of position on the tax exemption question, and the decision in Green v. Connally, supra, in order to determine whether there is a basis to conclude that Congress has in more recent years authorized the IRS to deny tax-exempt status to educational institutions that practice racial discrimination. 16/ Such an examination reveals no legitimate basis for reaching such a conclusion.

To start with, it is well settled that the intent of a subsequent Congress has little bearing on the interpretation of a statute enacted years earlier. "[T]he views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" Rainwater v. United States, 356 U.S. 590, 593; United States v. Price, 361 U.S. 304, 313 (1960); Haynes v. United States, 390 U.S.

16/ In this instance, because the language of the statute is clear and unambiguous, a strong argument can be made that resort to legislative history, either before or after enactment of Section 501(c)(3), is inappropriate. See Ernst & Ernst v. Hochfelder, supra; Packard Motor Co. v. NLRB, 330 U.S. 485, 492 (1947) ("There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law.").

85, 87 n.4. (1968); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968). This point was underscored by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), in the following terms:

> The views expressed by particular legislators as to the meaning of that language in [the statute being construed] "cannot serve to change the legislative intent of Congress . . . 'since the statements were [made] after passage of the [Clayton] Act.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), quoting National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 639 n.34 (1967).

Thus, in Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979), the Court rejected the argument that a committee report written eleven years after a statute was passed should be considered in construing the statute. The Court there stated (Id. at 758):

> "It is the intent of the Congress that enacted [the section] . . . that controls." Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977). Whatever evidence is provided by the 1978 Committee Report of the intent of Congress in 1967, it is plainly insufficient to overcome the clear and convincing evidence that Congress intended [the statute to be interpreted as the Court held].

Accord, Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102, 118 n.13 (1980).

Similarly, evidence of congressional inaction has been accorded no weight by the courts in the effort to illuminate the intent of an earlier Congress. As noted in United States v. Wise, 370 U.S. 405, 411 (1962):

> [S]tatutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here.

Accord, Waterman Steamship Corp. v. United States, 381 U.S. 252, 269 (1965) ("the abortive action of the subsequent Congress [in considering a 'clarifying' amendment] 'would not supplant the contemporaneous intent of the Congress which enacted the . . . Act'").

Since 1970, several bills have been introduced in Congress, seeking in a variety of ways to legislate with regard to tax-exempt status of private schools practicing racial discrimination. 17/

17/ These bills fall into several categories. (a) Bills providing that private schools shall not be denied tax exemptions on account of their admissions policies or the composition of the student body or faculty. (H.R. 68, 92d Cong., 1st Sess. (January 22, 1971) (Congressman Abernethy); H.R. 2352, 92d Cong., 1st Sess. (January 25, 1971) (Congressman Nichols); H.R. 5350, 92d Cong., 1st Sess. (March 2, 1971) (Congressman Edwards); H.R. 1394, 93d Cong., 1st Sess. (January 6, 1973) (Congressman Edwards)). (b) Bills providing that tax exemptions and the deductibility of contributions to tax-exempt organizations shall not be construed as the provision of Federal assistance. (H.R. 1002, 96th Cong., 1st Sess. (January 18, 1979) (Congressman Dornan); S. 449, 96th Cong., 1st Sess. (February 22, 1979) (Senator Hatch); H.R. 5186, 97th Cong., 1st Sess. (December 11, 1981) (Congressman Dornan)). (c) Bills providing that the IRS may not terminate the exempt status of an educational organization for reasons of racial discrimination unless the organization is adjudicated as racially discriminatory in a court. (H.R. 1905, 96th Cong., 1st Sess. (February 8, 1979) (Congressman Ashbrook); H.R. 95, 97th Cong., 1st Sess.) (January 5, 1981) (Congressman Ashbrook); H.R. 332, 97th Cong., 1st Sess.) (January 5, 1981) (Congressman Holt); H.R. 802, 97th Cong., 1st Sess. (January 9, 1981) (Congressman Chappell)). (d) Bill providing a declaratory judgment procedure for denying tax-exempt status to private schools on the basis of racial discrimination. (S. 995, 96th Cong., 1st Sess. (April 24, 1979) (Senators Helms, Ford, Schweiker, Stevens, and Zorinsky)). (e) Bill to prevent the IRS from implementing proposed rules relating to determination of whether private schools have discriminatory policies. (S. 103, 96th Cong., 1st Sess. (January 18, 1979) (Senators Schmitt, Laxalt, Nunn, Schweiker, Goldwater, Stevens, Zorinsky, Hayakawa, Thurmond, Helms, Cochran, Tower, Warner, McClure, and Hatch)).

None of these bills ever was voted upon on the floor of either House of Congress.

Because none of the bills was enacted as law, they remain wholly irrelevant to the central question of congressional authorization of the activity in question. United States v. Wise, supra. 18/

18/ The Supreme Court's decision in Runyon v. McCrary, 427 U.S. 160 (1976), does not suggest otherwise. That case construed 42 U.S.C. § 1981 to apply to private acts of racial discrimination, and based that interpretation on an earlier Court decision, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Subsequent to the Jones decision, Congress considered and rejected an amendment to the Equal Employment Opportunity Act of 1970 which would have repealed the statutory interpretation used by the Court in Jones insofar as it gave private sector employees a right of action based on racial discrimination in employment. The Runyon Court concluded from this that the theory which supported its interpretation of Section 1981 had been challenged unsuccessfully in Congress. The Court thus presumed "congressional agreement with the view that § 1981 does reach private acts of racial discrimination." Id. at 175 (emphasis in original). The extent to which the Runyon Court relied upon this congressional inaction in deciding the case is unclear. Presumably the Court did not give that factor much weight since "unsuccessful attempts at legislation are not the best of guides to legislative intent." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 382 n.11 (1969); see also United States v. Wise, 370 U.S. at 411; Waterman Steamship Corp. v. United States, 381 U.S. at 269. In any event, Runyon is distinguishable from the situation with regard to Section 501(c)(3) because no legislation which would have disapproved of or overruled the interpretation given to Section 501(c)(3) by the Green court and by the IRS in 1970 has ever been considered on the floor of either House of Congress.

The inquiry into Congressional authorization focuses on later legislation that is actually enacted by Congress. In what is generally regarded as the leading case in this area, the Supreme Court in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), held that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Id. at 380-81 (emphasis supplied). In that case, a 1959 amendment to the 1927 Communications Act defined the general term "public interest" as used in the original statute. The Court found that the subsequent legislative language "makes it very plain that the phrase 'public interest,' which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues." Id. at 380.

Here, no such subsequent legislation exists. Congress has not altered, amended or in any respect modified the pertinent language of Section 501(c)(3) since it was enacted in 1954. Nor can it reasonably be argued that enactment by Congress in 1976 of Section 501(i) to the Internal Revenue Code, or its adoption in 1978 of the Ashbrook and Dornan Amendments to the Treasury, Postal Service, and General Government Appropriations Act of 1980 (the "1980 Appropriations Act"), compels a contrary conclusion.

1. Section 501(i).

In 1976, Congress added to the Internal Revenue Code a provision, now contained in Section 501(i), which denies tax exempt status to a social club if its charter or any of its written policy statements provide for "discrimination against any person on the basis of race, color, or religion." Pub. L. No. 94-658, § 2(a), 10 Stat. 2697.

The Reports of both the House and Senate regarding that proposed law state that the Internal Revenue Code does not explicitly deal with the question whether an income tax exemption for social clubs "is incompatible with discrimination on account of race, color, or religion." H.R. Rep. No. 94-1353, 94th Cong., 2d Sess. 8 (1976); S. Rep. No. 94-1318, 94th Cong., 2d Sess. 7 (1976). The Reports also note that a three-judge district court had held that providing tax exemptions to social clubs which discriminate on account of race does not violate the Constitution. Id. See McGlotten v. Connally, 338 F. Supp. 448, 457-59 (D. D.C. 1972) (Bazelon, J.).

Having set forth the state of the law with regard to racially discriminatory private clubs, the Reports cite the "reasons for change" in the law as follows:

> [I]t is inappropriate for a social club or similar organization described in section 501(c)(7) to be exempt from income taxation if its written policy is to discriminate on account of race, color, or religion.

H.R. Rep., *supra* at 8; S. Rep., *supra* at 8. Thus the "reasons for change" cited by the Congress were specific to social clubs and to Section 501(c)(7). There is nothing to suggest the purpose was to place the same restrictions on social clubs as the IRS had placed on educational organizations.

In a footnote to the "Present law" section of both congressional reports on this bill is a reference to the fact that *McGlotten* also held that the Code's scheme of exemption for fraternal orders amounts to "state action" rendering the Code's "aid" to racially discriminatory fraternal orders unconstitutional. 338 F. Supp. at 459. 19/ The footnote continues:

> Also, the Supreme Court has affirmed (*Coit v. Green*, 404 U.S. 997 (1971)), a decision (*Green v. Connally*, 330 F. Supp. 1150 (D.C., D.C. 1971)) that discrimination on account of race is inconsistent with an educational institution's tax-exempt status (sec. 501(c)(3)) and also with its status as a charitable contribution donee (sec. 170(c)(2)).

19/ The *McGlotten* court further held that a proper interpretation of the charitable deduction subsection relating to fraternal orders precludes allowance of deductions for gifts to racially discriminatory fraternal orders. 338 F. Supp. at 459-60.

H.R. Rep. at 8; S. Rep. at 8. The language of this footnote citation in no way indicates approval of or acquiescence in existing case law, but only acknowledgement, and it is the only mention of Section 501(c)(3) organizations in any part of the statute and legislative history. Moreover, the footnote is incorrect in one significant respect: it omits the fact that the Supreme Court had by that time indicated in Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974), that the summary affirmance of Coit v. Green, supra, lacked precedential weight because it was not a truly adversarial appeal, and thus the question of whether a discriminating school could obtain tax-exempt status remained open (see n.1, supra). 20/

20/ That this singular footnote reference to Green in the committee reports cannot be read as an authoritative expression of congressional will was made clear by the Supreme Court in Consumer Product Safety Commission v. GTE Sylvania, supra. There, the Court gave no weight to statements contained in a conference committee report because the legislation which was the subject of the report did not deal with the issue discussed in the statements in question, because the interpretation espoused by the conferees was not mentioned by the committee which drafted the amending act, and because the interpretation espoused in the report was not debated on the floor of Congress. Similarly, in the committee reports relating to the 1976 amendment to the Code, the amending legislation did not purport to interpret Section 501(c)(3) and, indeed, concerned Section 501(c)(7) organizations only, the Senate and House Reports use virtually identical language, which suggests the absence of independent consideration of the proper scope of Section 501(c)(3), and the interpretation suggested by the reports was not debated on the floor of Congress. Thus the conclusion of the Court in GTE Sylvania applies equally here: "the statement of the Conference Committee is far from authoritative as an expression of congressional will. . . ." 447 U.S. at 120.

In floor debate on the legislation there was no indication that Congress intended to approve of the 1970 IRS policy or that the bill derived from that ruling. Congressmen Ullman and Frenzel, who spoke in support of the bill, explained the nondiscrimination provision with regard to social clubs as "a new requirement" and a "major change in the tax law . . . with regard to social organizations." 122 Cong. Rec. H27452 (daily ed. Aug. 24, 1976). Neither gentleman made any reference to IRS policy with regard to Section 501(c)(3) organizations.

The statute as it was considered in committee made changes in the revenue laws only with regard to Section 501(c)(7) organizations (social clubs and similar groups). It amended Code provisions dealing only with the tax status of such organizations. On the Senate floor an amendment was added concerning tax carryovers and the commissioning of a study of tax incentives for recycling. Thus, the focus of the legislation and of the legislators was the taxation of social clubs, not amendment of the tax laws regarding exempt organizations generally. That legislation provides no guidance as to the intended interpretation of Section 501(c)(3) or as to the meaning of the terms "charitable," educational" or "religious" as used in that Code provision.

2. Ashbrook and Dornan Amendments

In 1978 and 1979, the IRS sought to supplement its procedures for verifying whether the actual practices of private schools conformed to the schools' announced policies of nondiscrimination. 43 Fed. Reg. 37296-98, Aug. 22, 1978; 44 Fed. REg. 9451-55, Feb. 9, 1979. The controversial nature of those proposals prompted congressional hearings. Tax Exempt Status of Private Schools: Hearings Before the Subcomm. on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess. (1979). While some of the witnesses testifying at those hearings assumed that Section 501(c)(3) authorized the IRS to deny tax exemptions to private schools with racially discriminatory policies, see, e.g., id. at 1176, (statement of James P. Turner, Deputy Assistant Attorney General, Civil Rights Division), other witnesses indicated that they did not believe the IRS had that power, see e.g., id. at 586 (statement of Hon. Strom Thurmond).

Congress responded to the controversy over the proposed revenue procedures by acting to prevent the IRS from enforcing its proposed regulations and from devising any additional procedures for enforcing its policy of denying tax-exempt status to racially discriminatory private schools. The Dornan Amendment, Section 615 of the 1980 Appropriations Act, Pub. L. No. 96-74, 93 Stat. 559, 577, provided that the funds made available by the Act could not be used to carry out the 1978 and 1979 proposed revenue procedures. The Ashbrook Amendment, Section 103 of the 1980 Appropriations Act, 93 Stat. at 562, specified that the funds appropriated could not be used "to formulate to carry out any . . . procedure, guideline . . . or measure which would cause the loss of tax-exempt status to private, religous, or church-operated schools under Section 501(c)(3) of the Internal Revenue Code of 1954 unless in effect prior to August 22, 1978."

It is important to emphasize that the Ashbrook and Dornan Amendments were additions to an appropriations bill. The House Report on the 1980 Appropriations Act includes a reminder that the rules of the House specifically prohibit appropriations acts from including language which is legislative in nature. H.R. Rep. No. 96-248, 96th Cong., 1st Sess. 4 (1979). The Report also states that "inclusion of such items in an appropriation act does not set a precedent and confers no subsequent legislative authority for such appropriations." Id.

The House Report on the 1980 Appropriations Act summarizes the Committee's misgivings concerning the proposed 1978 and 1979 revenue procedures:

> On August 22, 1978, and on February 9, 1979, the Internal Revenue Service issued proposed revenue procedure [sic] relating to the tax exempt status of private schools. At present the legislative oversight committees of both the House and Senate are considering these proposals. This Committee, too, is concerned about the Internal Revenue Service issuing revenue procedures in an area where legislation may be more appropriate. The responsibility of the Internal Revenue Service is to enforce the tax laws. The purpose of the Internal

> *Revenue Service revenue procedures ought to be to clarify these laws, not to expand them. The issue of tax exempt status of schools is a matter of far-reaching social significance and the Service ought to issue revenue procedures in this area only when the legislative intent is fairly explicit.* The Appropriations Committee is *unsure* that the proposed revenue procedures issued by the Service are the proper expression of that legislative intent. The Committee believes that the Service ought not issue these revenue procedures until the appropriate legislative committees have had a chance to evaluate them and make the determination that the proposed revenue procedures are a proper expression of the tax laws.

Id. at 14-15 (emphasis supplied). Thus, the Committee Report eschews any definitive conclusion with regard to IRS authority, stating that the Committee is "unsure" whether the 1978 and 1979 procedures accord with legislative intent. Moreover, the Report counsels that action be taken by the Service in the area of tax exemptions for private schools "only when the legislative intent is fairly explicit." This explanatory passage cannot be construed as indicating approval of existing IRS policy with regard to private schools.

The Ashbrook and Dornan Amendments on their face do not affect the then-existing nondiscrimination policies of the Service. *See* Rev. Rul. 71-447, 1971-2 Cum. Bull. 230; Rev. Rul. 75-231, 1975-1 Cum. Bull. 158; Rev. Proc. 75-50, 1975-2 Cum. Bull. 587. Statements by the sponsors of the Amendments confirm this limitation on the scope of the appropriations bill. 21/ These statements, recognizing the extent of the Amendments' temporal reach, do not sanction or

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21/ See Appendix A, *infra*.

approve the pre-August, 1978 IRS policies. They do no more than recognize the existing IRS revenue rulings and procedures and the obvious fact that the Amendments would not affect them. Indeed, the sponsors of the amendments indicated that they did *not* believe the IRS had authority to deny tax exemptions to racially discriminatory schools. 22/ Moreover, the Amendments were not intended to be Congress' final statement on the issue of tax exemptions for racially discriminatory schools. The sponsors stated that these appropriations limitations were intended to allow Congress time to act in the area. 23/

Statements in the course of legislative debate by individual legislators who are not sponsors of the legislation or responsible for its drafting generally are entitled to little weight in searching for the intent of the entire legislative body. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964). In any event, no conclusive legislative view of the 1970 IRS policy can be discerned from the debate on the Ashbrook and Dornan Amendments. Some legislators expressed the view that the IRS did not have authority to deny tax exemptions to racially discriminatory schools, while others expressed the opposite view. 24/

22/ See Appendix B, *infra*.

23/ See Appendix C, *infra*.

24/ See Appendix D, *infra*.

The Ashbrook and Dornan Amendments have been extended in subsequent fiscal years. In the Appropriations Act for fiscal 1982 the Ashbrook Amendment was extended with the addition of language which prohibits use of appropriations to "carry out any . . . court order . . . which would cause the loss of tax-exempt status . . . unless in effect prior to August 22, 1978." 25/

Statements of Congressmen Ashbrook and Dornan in support of extending their respective Amendments again acknowledged that the Amendments only alter IRS procedures implemented subsequent to August, 1978. 26/ Also in these debates, Congressman Ashbrook indicated very clearly that in his opinion the IRS does not

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25/ The Ashbrook Amendment passed the House on July 30, 1981. See 127 Cong. Rec. H5398 (daily ed., July 30, 1981). It was approved by the Senate Committee on Appropriations on September 15, 1981. See 127 Cong. Rec. D1057 (daily ed., Sept. 15, 1981). Although the House bill has not yet been enacted, it was temporarily effective from October 1, 1981, until November 20, 1981, pursuant to Pub. L. No. 95-51, the continuing Appropriations Act. That Act was extended, by amendment, to December 15, 1981. See Pub. L. No. 97-85. On December 15, a joint resolution further extending these conditions for fiscal year 1982 became law. See Pub. L. No. 97-92.

26/ See Appendix E, infra.

have authority to deny tax exemptions to racially discriminatory private schools. 27/

In passing the Ashbrook and Dornan Amendments, Congress called a halt to the effort of the IRS to establish stricter and more detailed procedures for implementing its 1970 policy of denying tax-exempt status to schools which discriminate on the basis of race. This legislative action, through amendments to appropriations bills, could not, and indeed did not, affect the definition of any statutory term or the interpretation of any Code provision. It was negative in effect, refusing to fund certain IRS procedures.

27/ See Appendix F, infra. One statement by Congressman Dornan in these debates could be read to suggest that he understood the IRS to have authority to deny tax-exempt status to discriminatory private schools:

> The IRS already has sufficient authority to deal with private tax-exempt schools which discriminate because of race. The proposed IRS regulations, and Judge Wrights's [Judge Hart's?] unconstitutional usurpation of Congressional taxing and appropriations powers -- thinly disguised as a court order -- should be rejected by this body, and in any case, will be rejected by the voters this fall at the Presidential and congressional levels.

126 Cong. Rec. H7209 (daily ed., Aug. 19, 1980). However, this statement also could be read in context as an acknowledgement only that the IRS would continue to be able to act under its pre-August 1978 rulings and procedures. This would seem the more reasonable construction in light of the congressman's previous statements indicating that Green v. Connally lacked precedential authority and that tax exemptions should not be considered the equivalent of federal subsidies. See Appendix B.

In construing appropriations measures, the Court presumes that the legislature has not attempted to alter substantive legislation. In acting on appropriations measures, legislators are entitled to assume that the funds are being used lawfully without foreclosing a later finding -- congressional or judicial -- that the agency has in fact been acting unlawfully. As stated in Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-91 (1978) (emphasis supplied):

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation. . . . Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI(2), for instance, specifically provides:
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> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order." (Emphasis supplied)

Accordingly, the Ashbrook and Dornan Amendments afford no legitimate basis for ascribing to Congress an intent contrary to that reflected in the language of Section 501(c)(3) and its legislative history. Indeed, in light of the clarity of the language of Section 501(c)(3), even less weight can be accorded to conflicting views of subsequent Congresses regarding the interpretation of the statute.

A similar issue of statutory construction was involved in SEC v. Sloan, 436 U.S. 103 (1978), which involved a reenactment in 1964 of Section 12(k) of the Securities Exchange Act of 1934. 28/ In the Senate committee report accompanying the 1964 legislation, the Commission's interpretation of Section 12(k) was endorsed. 29/ The Supreme Court rejected the argument that this later expression of congressional intent should prevail over the plain, and contrary, meaning of the statute, declaring (436 U.S. at 121):

> Even if we were willing to presume such general awareness on the part of Congress, we are not at all sure that such awareness at the time of reenactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the language of § 12(k). On this point the present case differs significantly from United States v. Correll, [389 U.S. 299, 304 (1967)] where the Court took pains to point out in relying on a construction of a tax statute by the Commissioner of Internal Revenue that "to the extent that the words chosen by Congress cut in either direction, they tend to support rather than defeat the Commissioner's position. . . ."

28/ Section 12(k) permits the SEC "summarily to suspend trading in any security . . . for a period not exceeding ten days" under certain specified circumstances.

29/ The Senate committee report stated:

> "The Commission has consistently construed section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. The committee accepts this interpretation."

As in Sloan, the meaning of Section 501(c)(3) is clear from its language, and use of subsequent legislative history to suggest otherwise would result in "virtually untrammeled and unreviewable power" being vested in an agency. Moreover, there is even less reason here than in Sloan to construe subsequent legislative history as indicative of a particular statutory interpretation. Nowhere does a committee report endorse the interpretation given Section 501(c)(3) by IRS in 1970, save, arguably, for Congressman Dornan's single statement in debate on the 1982 extension of his Amendment (see n.27 supra,). 30/ In the context of the great differences of opinion expressed in the debates with regard to the validity of the Service's 1970 policy, this single

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30/ Shortly after the IRS announced its new position with regard to the tax exempt status of racially discriminatory schools, the IRS Commissioner appeared to testify before the Senate Select Committee on Equal Educational Opportunity. The Commissioner explained the Service's new policy and proposed modes of enforcement. The Chairman of the Select Committee urged him to monitor attendance records rather than to accept a private school's assurance of a nondiscriminatory admissions policy. Hearings, Equal Educational Opportunity before the Senate Select Comm., 91st Cong., 2d Sess. 1992-2028 (1970). This colloquy amounted to no more than a reiteration of the the Service's recent policy and an expression of approval by an individual Senator. No legislation pertaining to the tax laws was proposed or considered.

statement cannot be deemed indicative of a general congressional acceptance of that IRS ruling, particularly since Congressman Dornan's statement is ambiguous and arguably inconsistent with his previous statements and since the other sponsors had unambiguously rejected the Service's interpretation of its authority. See Appendix B. See Chrysler v. Brown, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.") Moreover, unlike Sloan, Congressman Dornan's statement did not accompany the reenactment of Section 501(c)(3), but was made in the context of an appropriations bill, which, as noted above, is presumed not to have a substantive effect on existing law. In any event, even if there had been a congressional consensus in conjunction with subsequent reenactment of the legislation, Sloan holds that where, as here, the meaning of the original statute is clear, that meaning is not supplanted by Congress' subsequent views. See also United States v. Philadelphia National Bank, 374 U.S. 32, 349 (1963); Illinois Brick Co. v. Illinois, supra, 431 U.S. 720, 733-34 n.14.

D. Congressional Acquiescence

There remains only the question whether, notwithstanding the foregoing discussion, the IRS's practice since 1970 of denying tax-exempt status to private schools that discriminate on account of race should be regarded as authorized by Section 501(c)(3) on the ground that Congress has allowed it to continue for some eleven years. Such a proposition arguably follows from the holding in Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 381, that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction."

This principle of statutory construction has in practice been used by the courts with great care, since its logical extreme would make an administrative construction unassailable in a very few years so long as Congress remains silent. In Red Lion itself, "the Congress ha[d] not just kept its silence by refusing to overturn the administrative construction, but ha[d] ratified it with positive legislation." Id. at 381-82. In Zemel v. Rusk, 381 U.S. 1 (1965), which is cited in Red Lion as authority for this principle, the administrative construction was uninterrupted for 26 years, and the Congress had not merely "refused to alter the administrative construction," but had reenacted the legislation without change. Id. at 12.

Subsequent to Red Lion, the Court has emphasized that the nexus between deference to administrative interpretation followed by reenactment of legislation without change. "[A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change." NLRB v. Aerospace Co., 416 U.S. 267, 274-75 (1974) (emphasis supplied); see Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

Other cases have held that while "it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. . . ., once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." United States v. Rutherford, 442 U.S. 544, n.10 (1979). Accord, Saxbe v. Bustos, 419 U.S. 65, 74 (1974) ("This longstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched."); Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978) (according great respect to agency's longstanding construction when "Congress has been made aware of this practice, yet four times has 'revisited the Act and left the practice untouched'").

Recently, however, the Court rejected the argument that the SEC's interpretation of the Securities Exchange Act of 1934 should be adopted where "Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted . . . and on each occasion Congress left the administrative interpretation undisturbed." Aaron v. SEC, 446 U.S. 680, 694 n.11 (1980). As the court explained:

> [S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10(b) so clearly at odds with its plain meaning and legislative history.

Similarly, although Section 501(c)(3) has been amended since 1970, the only occasion on which the IRS construction with regard to discriminatory private schools was brought to the attention of the Congress was upon enactment of Section 501(i). But that legislation was addressed to matters other than the one at issue here: viz., various aspects of the tax treatment of private clubs' income. Nor was discussion of the 1970 IRS revenue ruling, which occurred in the context of an appropriation measure, equivalent to a failure to alter administrative construction. As noted above, "[W]hen voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). Thus, as in *Aaron*, the failure of Congress to act falls far short of supporting a construction of Section 501(c)(3) "so clearly at odds with its plain meaning and legislative history."

The last point is perhaps the most important in this connection. Even where the agency's statutory construction has been consistent and longstanding, and even where Congress, having been informed of the agency's construction, has reenacted the statute without overturning that construction, the courts will reject an agency interpretation unsupported by the language of the statute and its legislative history. *Sloan*, *supra*, 436 U.S. at 119-20, 122-23. Indeed, here the argument for legislative acquiescence in agency interpretation of Section 501(c)(3) is much less compelling than that with regard to the statute at issue in *Sloan*. *Sloan* considered an agency construction which had stood consistently for 34 years, during which time the statute had been reenacted with a legislative history indicating approval of the agency construction. *Id*. at 117. The IRS construction of Section

501(c)(3) in regard to discriminatory schools has stood for only 11 years and represents a reversal of the agency construction given the statute for more than a half century preceding 1970. Moreover, here there has been neither statutory reenactment nor a process of amendment which focused attention on the IRS construction without changing it. In these circumstances, congressional silence cannot override the enactment years ago of specific legislation.

E. Case Law Supporting IRS Authority to Deny Tax Exemptions to Discriminatory Private Schools Under Section 501(c)(3)

Although the Supreme Court summarily affirmed the decision of the three-judge district court in Green v. Connally, 330 F.Supp. 1150 (D.D.C.) summarily aff'd per curiam sub nom., Coit v. Green, 404 U.S. 997 (1971), the question whether racially discriminatory private schools are entitled to tax exemption under Section 501(c)(3) remains open. A summary affirmance by the Supreme Court, while affirming the judgment appealed from, does not constitute an endorsement of the lower court's reasoning. Mandel v. Bradley, 432 U.S. 173, 176 (1976); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C. J. concurring). Moreover, the Court has cautioned that the Service's change in legal position during the course of the Green lawsuit made the appeal nonadversarial, stripped the summary affirmance of precedential weight accorded adversarial proceedings, and left unresolved the question of whether private schools under Section 501(c)(3) must satisfy the requirements of a common law charity. Bob Jones University v. Simon, 416 U.S. 725, 740 n.11 (1974); Prince Edward School Foundation v. United States, ____ U.S.____, 101 S.Ct. 1408 n.1 (1981) (Rehnquist, J., joined by Stewart and Powell, J.J., dissenting from denial of certiorari).

The district court in Green and the Fourth Circuit Court of Appeals in Bob Jones University relied on Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958), to buttress the conclusion that Congress intended to deny Section 501(c)(3) tax exemptions to private schools that practice racial discrimination. In Tank Truck, a trucking business deducted from gross income fines paid for violating state maximum weight laws. The taxpayer urged that the fines were "ordinary and necessary" expenses under the predecessor to Section 162(a) of the 1954 Internal Revenue Code. The Supreme Court affirmed the Commissioner's disallowance of the deduction, holding that an expense is not "necessary" to the operation of a business "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." The fines assessed against the taxpayer were for violations of penal statutes enacted to protect state highways from damage and to insure the safety of highway users. Observing that "[d]eduction of fines and penalties uniformly has been held to frustrate state policy in severe and direct fashion by reducing the 'sting' of the penalty prescribed by the state legislature," the Court concluded that Congress did not intend to allow income tax deductions for fines incurred to punish violations of state penal laws.

The Tank Truck decision centered on the meaning of a "necessary" business expense under Section 162(a) of the Code. Nowhere did the Court suggest that other Code provisions should be construed to avoid direct frustration of sharply defined national or state policy. Indeed, even in the context of "ordinary and necessary" business deductions under Section 162(a), the Supreme

Court has admonished that the "public policy" exception to the general rule of deductibility is "sharply limited and carefully defined " And, as the Court observed in Commissioner v. Tellier, 383 U.S. 68, 691 (1966):

> . . . The Federal income tax is a tax on net income, not a sanction against wrongdoing. That principle has been firmly imbedded in the tax statute from the beginning. One familiar facet of the principle is the truism that the statute does not concern itself with the lawfulness of the income that it taxes.
> Id. at 691.

In the absence of specific legislation denying deductibility to certain types of business expenses, "it is only in extremely limited circumstances that the Court has countenanced exceptions to the general principle [of deductibility] reflected in [previous] decisions." Id. at 693-94.

Moreover, Congress circumscribed the denial of tax deductions on grounds of public policy in the aftermath of Tank Truck. In 1969 and 1971, Congress enacted rules to explicitly limit the public policy doctrine of nondeductibility. The Senate Finance Committee's report accompanying the 1969 enactment stated:

> The [newly enacted] provision for the denial of the deduction for payments in these situations which are deemed to violate public policy is intended to be all inclusive. Public policy, in other circumstances, generally is not sufficiently clearly defined to justify the disallowance of deductions.

1969-3 Cum. Bull. 423, 597 (emphasis supplied). See Bittker & Kaufman, Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code, 82 Yale L.J. 51, 75 (1972). Congress has thus manifested its intent to strictly limit the public policy doctrine applied by the Court in Tank Truck, and has declined to make racial discrimination a basis for applying the doctrine. See 26 U.S.C. §162(c) and (f).

Furthermore, as previously discussed, the language and legislative history of Section 501(c)(3) of the Code do not convincingly indicate an intent to carve out a federal or state public policy exception to the plain terms of the statute. Congress explicitly designated educational organizations as entitled to tax-exempt status under Section 501 (c)(3). Congress also has voiced a policy denouncing private acts of racial discrimination in school admissions, see 42 U.S.C. § 1981; Runyon v. McCrary, 427 U.S. 160 (1976), and by organizations receiving federal financial assistance, see 42 U.S.C. § 2000d, and has prescribed remedies of damages, injunctions, and the withholding of federal assistance for violations of the articulated policies. There is no indication in the language of Section 501(c)(3), nor its legislative history, that Congress also intended to make available as an additional sanction against racial discrimination the removal of tax-exempt status from otherwise qualified private schools. That policy decision is Congress' to make, not the courts or administrative agencies. Where Congress has not imposed such a sanction in explicit terms, to divine the remedy by implication is disfavored. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-20 (1979).

This is not to suggest that Congress cannot, or indeed that it should not, undertake to enact legislation authorizing denial of tax-exempt status to private schools that discriminate on account of race. The point is that it has not yet done so, either in Section 501(c)(3) of the Code or elsewhere.

F. Constitutional Concerns

Interpreting Section 501(c)(3) to afford tax-exempt status to private schools that practice racial discrimination raises no substantial constitutional question 31/ under the equal protection component of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954). A facially neutral statute affronts equal protection norms protecting against racial discrimination only if its enactment was animated by a discriminatory purpose. Washington v. Davis, 426 U.S. 229, 239 244 (1976). Discriminatory purpose is not proven by demonstrating that the legislators foresaw a statute's discriminatory effects. An illicit purpose is established only by proof "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its" discriminatory effects. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

Section 501(c)(3) is not tainted by any discriminatory purpose. Nothing in its language or legislative history suggests a purpose to afford tax-exempt status to educational organizations in order

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31/ Commentators have suggested that if tax exemptions were deemed to impose constitutional obligations on the recipient, no one would be immune, since for example, individual taxpayers receive "subsidies" in the form of interest deductions, charitable contribution deductions, and medical expense deductions, while corporations receive a surtax exemption. Bittker & Kaufman, supra at 68-74. "[T]he Internal Revenue Code is a pudding with plums for everyone."

to foster racial discrimination by private schools. The district court in Green acknowledged that Section 501(c)(3) was not actuated by a racially discriminatory purpose. 309 F. Supp. at 1136. Thus, Section 501(c)(3) is not per se unconstitutional.

As applied to private schools practicing racial discrimination, the tax exemption conferred by Section 501(c)(3) would be unconstitutional only if it made the government a veritable partner or joint venturer in the schools' enterprises. Moose Lodge v. Irvis, 407 U.S. 163, 176-177 (1972); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The grant of a tax exemption, simpliciter, does not make the government a sponsor or partner of the benefitted organization because it involves no transfer of government revenues, but only abstention from demanding that the beneficiary support the government. See Walz v. Tax Commission, 397 U.S. 664, 675 (1970). Nor does the mere fact that a tax exemption is valuable alter this conclusion in any respect. See Moose Lodge v. Irvis, supra (holding that an award of a state liquor license did not unconstitutionally implicate the state in the racially discriminatory policies of the recipient private club); Walz v. Tax Commission, supra at 674-675 (upholding tax exemption for churches).

Section 501(c)(3) plays absolutely no part in establishing or enforcing the racially discriminatory policies subscribed to by Bob Jones or Goldsboro. Nothing in the records in Bob Jones University or Goldsboro suggests that any other federal statute or government action inspired Bob Jones or Goldsboro to adopt their racially discriminatory practices. 32/ Accordingly, the tax exemptions accorded to Bob Jones and Goldsboro cannot be said to have unconstitutionally fostered or encouraged racial discrimination. Moose Lodge v. Irvis, supra at 176-177. Both the district court in Green 33/ and the court of appeals

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32/ The district courts in these cases found that the discriminatory practices were premised on sincerely held religious beliefs.

33/ In Green v. Connally, 309 F. Supp. 1127, 1136-1137 (D.D.C. 1970), the district court concluded that a serious constitutional question would be raised if tax exemptions under Section 501(c)(3) were obtained by private schools practicing racial discrimination. The court reasoned that government action that so increases the incidence of private discrimination as to frustrate the exercise of fundamental liberties violates the equal protection standards of the Fifth Amendment. The court further maintained that federal tax exemptions for private schools practicing racial discrimination would provide them significant support in a way that might obstruct desegregation goals of public school systems. That nexus between federal tax exemptions and the constitutional right to desegregated schooling the court concluded, raised a difficult constitutional question.

The conclusion of the district court contravenes the teaching of Moose Lodge v. Irvis, supra, that economic benefits conferred by the government on racially discriminating private parties are constitutionally permissible absent proof that the benefits were an inspiration for the adoption or enforcement of the racially discriminatory practices. There was no suggestion in Green that the defendant schools were inspired by Section 501(c)(3) to adopt or enforce racially discriminatory policies. See also note 27, supra.

in Bob Jones University 34/ erred in concluding otherwise.

G. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits racial discrimination under any program or activity "receiving Federal financial assistance." Congress defined "Federal financial assistance" in 42 U.S.C. § 2000d-1 as "assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty." Department of Justice regulations that elucidate the meaning of Section 2000d-1 provide:

> The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at

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34/ In Bob Jones University, the court erroneously interpreted Norwood v. Harrison, 413 U.S. 455 (1973), as enjoining the government from providing "any form of tangible assistance" to schools which discriminate on the basis of race, and thus concluded that the government must "steer clear" of affording significant tax support to such organizations. 639 F.2d at 152 n.7. The Norwood decision, however, did not invalidate all government forms of tangible aid to discriminating schools, but only such aid as is readily available in the market and provided only to schools and not in common with other organizations. 413 U.S. at 415. Section 501(c)(3) tax exemptions are not limited to schools, and are not available from sources independent of the government. The exemptions, thus, do not run afoul of the Norwood rationale. Any suggestion that Norwood rendered constitutionally suspect all government benefits with racially discriminatory effects (see 413 U.S. at 466) is unpersuasive in light of Washington v. Davis, supra, and Massachusetts v. Feeny, supra, holding that a discriminatory purpose is necessary to establish an equal protection violation. The Norwood decision thus does not cast a constitutional cloud over the conferral of Section 501(c)(3) tax exemptions on private schools practicing racial discrimination.

> a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangment, or other contract which has as one of its purposes the provision of assistance.

28 C.F.R. §42.102(c).

The language of a statute should be read in its ordinary sense absent persuasive reasons that Congress intended otherwise. Burns v. Alcala, 420 U.S. 575, 580-581 (1975). "[L]egislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc. 322 U.S.607, 618 (1944).

Title VI defines "Federal financial assistance" in terms of specified generic types of aid: grants, loans, and contracts other than contracts of insurance or guaranty. None of these categories understood in their ordinary senses includes tax exemptions. Moreover, the maxim of statutory construction expressio unius est exclusio alterius counsels that the term "Federal financial assistance" not be expanded beyond the three expressed generic categories. The Department of Justice explanatory regulations confirm this reading.

The legislative history of the 1964 Civil Rights Act also renders unpersuasive the contention that tax exemptions constitute federal financial assistance. There is no mention of the possibility that tax exemptions could be the basis for triggering federal coverage under Title VI. A list of covered federal programs prepared by the Deputy Attorney General in connection with hearings on Title VI does not include tax exemptions as triggering coverage, even though the list referred to such minor instances of federal financial assistance as payments to three counties in Minnesota from the national forest fund and payments to the National Board for Promotion of Rifle Practice. *Hearings on H.R. 7152 as amended by House Comm. on the Judiciary*, 88th Cong., 2d Sess., pt. VI, ser. 4, at 2773 (1964). *See generally*, *Bittker & Kaufman*, *supra* at 83-84. "[I]f 'tax subsidies' were embraced by the statutory language [of Title VI], the legislators were unaware of that fact." *Id*. at 83.

Moreover, the proposition that income tax exemptions are "Federal financial assistance" is inconsistent with the structure of the Civil Rights Act of 1964. For example, Title II of the Act, relating to public accommodations, exempts from nondiscrimination requirements "an establishment located within a building which is actually occupied by the proprietor of such establishment as his residence. . . ." 42 U.S.C. §2000a (b)(1). However, if the proprietor claimed an investment tax credit on purchasing a new stove, and if such a tax subsidy were deemed "Federal financial assistance," the Title II exemption would be nullified. Similarly, under this conception of "Federal financial assistance" the exclusion of contracts of insurance and guaranty from coverage under Title VI would be cancelled if the contract recipient were a corporation which took advantage of the corporate surtax exemption. *Bittker & Kaufman*, *supra*, at 81.

A three-judge federal district court in McGlotten v. Connally, 338 F. Supp 448 (1972), erred in equating tax exemptions with "federal financial assistance." 35/ The district court conceded that neither the language, agency interpretations, nor legislative history of Title VI of the Civil Rights Act demonstrated an intent to include Section 501(c) tax exemptions within the ambit of federal financial assistance. Id. at 461. The district court insisted, nevertheless that the "plain purpose" of the statute to promote nondiscrimination should override its plain language in determining whether federal tax exemptions constituted federal financial assistance. Id. The nondiscrimination purpose of Title VI would be advanced, the district court concluded, if some tax exemptions were equated with a distribution of federal funds, property, or use of federal personnel, and were thus treated as federal financial assistance.

The reasoning of the McGlotten district court is unsound. The court declined to apply the maxim that the plain language rather than the general purpose of a statute should govern its interpretation, absent contrary congressional direction. Burns v. Alcala, supra. In addition, the court's equation of tax exemptions with the distribution of federal funds seems premised on the idea that the government is entitled to all property and earnings of private parties, and thus a failure of Congress to tax constitutes federal financial assistance. The Supreme Court

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35/ No other court has concurred in the McGlotten conclusion that tax exemptions are within the ambit of 42 U.S.C. §2000d.

rejected that concept in *Walz v. Tax Commission*, *supra*, holding that a tax exemption reflects only government restraint from demanding private financial support for the government, not a flow of assistance or revenues from the government to the exempt organization.

CONCLUSION

Congress has not empowered the IRS to deny Section 501 (c)(3) tax exemptions to private schools that engage in racially discriminatory practices. The Constitution also does not invest the IRS with such authority.

W. Bradford Reynolds

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

APPENDIX A

On presenting his Amendment, Congressman Dornan stated:

> Let me emphasize that my amendment will not affect existing IRS rules which IRS has used to revoke tax exemptions of white segregated academies under Revenue Ruling 71-447 and Revenue Procedure 75-50.

125 Cong. Rec. H5982 (daily ed. July 16, 1979).

Congressman Ashbrook stated as follows in presenting his Amendment:

> My amendment very clearly indicates on its face that all the regulations in existence as of August 22, 1978, would not be touched.
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> * * *
>
> The thing to reemphasize is that my amendment would not in any way interrupt [IRS] continued case-by-case process which they were using up until August 22 and from which point they are going to change.
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> * * *
>
> As I pointed out, under their current regulation 7450, they can review schools. They can bring schools in effect before the mast, even though they have given them prior tax exempt status. I am not trying to take that away.

125 Cong. Rec. H5882 (daily ed. July 13, 1979).

In proposing the Ashbrook amendment on the Senate floor, Senator Helms stated:

> Mr. President, the purpose of this amendment is quite simple: it places a 1-year moratorium on the ability of the Internal Revenue Service to establish new procedures -- and I emphasize the word "new" -- regarding the termination of the tax-exempt status of private schools. This prohibition is forward looking only. It is not retroactive. IRS would still be able to enforce all regulations which were in effect as of August 22 of last year.
>
> Under my amendment, the IRS may still move to withdraw the tax exempt status of a school which has failed to meet the standards of Revenue Procedure 75-50.
>
> * * *

The existing law provides substantial procedures for the IRS to deny the tax exempt status of schools which discriminate.

In fact, IRS has denied the tax-exempt status of over 100 schools which it, or a court, has found to be discriminatory. My amendment today does not change the existing law contained in Revenue Procedure 75-50, and thus it preserves the ability of IRS to act against offending schools on a case-by-case basis.

125 Cong. Rec. S11979-80 (daily ed. Sept. 6, 1979).

APPENDIX B

Congressman Dornan indicated that he did not consider Green v. Connally to be authoritative precedent and that he disagreed with the proposition that tax exempt status is a form of federal subsidy:

> The IRS claims that it is under court order to remove the tax-exempt status of private schools engaged in racial discrimination. But the Green v. Connally (1971) case upon which it relies was limited solely to segregated academies with no open admissions policies in the State of Mississippi. The court, moreover, explicitly refrained from deciding the question of religious private schools. In addition, the Supreme Court case of Bob Jones University v. Simon (1976) held that the Green case was not a true adversary proceeding and therefore could not serve as a legal precedent.
>
> Mr. Chairman, there is another point of paramount importance that needs to be made. The denial of tax-exempt status to private schools is predicated on the assumption that tax exempt status is a form of Federal assistance or subsidy. Such an assumption not only assumes that the Government owns all wealth, but flies in the face of original congressional intent as well as the Supreme Court case of Walz against Tax Commission of the City of New York (1970). Professors Bittker and Radhert of Yale University point out that "The tax exemption of non-profit organizations from federal taxation is neither a special privilege nor a hidden subsidy. Rather, it reflects the application of established principles of income taxation to organizations which, unlike the typical business corporation, do not seek profit," 85 Yale Law Journal, at 299 (1976). Justice Brennan in his concurring opinion in the Walz case notes that, "Tax exemptions and general subsidies are qualitatively different." In short, the assumption that tax exemption is a form of Federal assistance or subsidy is thoroughly totalitarian in nature allowing the Government to tax everything that lives, moves, and has being.

125 Cong. Rec. H5980 (daily ed. July 16, 1979).

In proposing the Ashbrook amendment on the Senate floor, Senator Helms stated:

> [E]arlier this year I was joined by Senators FORD, SCHWEIKER, STEVENS, and ZORINSKY in introducing S. 995, the Private School Non-Discrimination and Due Process Act of 1979. This legislation would for the first time expressly authorize the IRS to move to terminate the tax-exempt status of private schools which discriminate. . . .

125 Cong. Rec. S1980 (daily ed. Sept. 6, 1979) (emphasis supplied). The bill referred to by Senator Helms states as part of the congressional "findings":

> (a)(2) . . . Congress has failed to provide guidance as to the tax-exempt status of [private elementary schools which discriminate on the basis of race in the admission of students];
>
> (3) revenue rulings and procedures adopted by the Internal Revenue Service which deny tax-exempt status to private schools that discriminate on the basis of race are not based on a specific statute but rest on broad grounds of fundamental public policy as determined by the Service. . . .

S.995, 96th Cong., 1st Sess. (April 24, 1979).

In debate the preceeding day regarding an amendment which would have struck the Dornan Amendment from the Appropriations bill, Senator Helms, who was in control of debate time in opposition to striking the Dornan Amendment, was even more explicit about his view of IRS authority to deny tax exemptions to private schools:

> Mr. President, the IRS has responded to the absence of specific statutory authority from Congress by constructing a theory which substantially distorts the legislative intent and clear meaning of section 501(c)(3) of the Internal Revenue Code. IRS asserts that for a private school to qualify for tax-exempt status under section 501(c)(3) it must be both a charitable and an educational organization. However, section 501(c)(3) lists the exempt purposes as being independent and separate. Nowhere in the statute can it be inferred that an organization seeking exemption must be both "charitable" as well as meet the requirements of one of the other listed purposes.
>
> The enumeration of exempt purposes in section 501(c)(3) is plain and unambiguous. It states that

> organizations are exempt which are "organized exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." By the rules of statutory construction, the word "or' [sic] must be read after each of the listed categories. This section is to be read to mean "religious OR charitable OR scientific OR educational."
>
> Congress clearly did not intend that "religious" or "educational" purposes be included under or in addition to a requirement of a "charitable" purpose. If Congress had wanted to provide for the double test of charitable and one other listed purpose, it could have done so with language such as "organized and operated exclusively for charitable (including, religious, scientific, testing for public safety, literary, or educational) purposes." However, Congress did not use this statutory construction.
>
> One important reason for rejecting such statutory language is the fact that it misstates the purpose of a religious organization. A church or a church-related school is not organized and operated exclusively or even substantially for charitable purposes. Such an organization is organized in the exercise of constituionally protected rights of worship and religion which may or may not include works of charity. As the Supreme Court recognized in Waltz [sic] v. Tax Commission, 397 U.S. 664 (1970), the tax exemption of religious organizations does not depend upon their serving some pragmatic community purpose.

125 Cong. Rec. S11835 (daily ed. Sept 5, 1979).

> Mr. President, since the IRS announced its policy to deny tax exempt status to private schools which allegedly operate on the basis of a policy of racial discrimination, it has done so without the legal authority of specific legislation. In a public statement made on January 9, 1978, IRS Commissioner Jerome Kurtz discussed the proposed regulations and admitted that the IRS has "almost no specific statutory guidance" in moving into this area.
>
> Instead, the IRS has argued that private schools must be treated as charitable organizations and has applied to them the common law principle that a charity must not operate illegally or contrary to public policy. The IRS has then defined this broad public policy mandate in terms of Brown against Board of Educaton and Title VI of the Civil Rights Act of 1964.

125 Cong. Rec. S11834 (daily ed. Sept. 5, 1979).

Congressman Ashbrook's view that the IRS Code does not permit denial of tax exemptions to private schools which discriminate is set forth in Appendix F.

APPENDIX C

Senator Helms:

> My amendment is neccessary to allow Congress the time to consider the numerous legislative proposals which have been introduced to deal with this problem.
>
> For example, earlier this year I was joined by Senators FORD, SCHWEIKER, STEVENS, and ZORINSKY in introducing S.995, the Private School Non-Discrimination and Due Process Act of 1979. This legislation would for the first time expressly authorize the IRS to move to terminate the tax-exempt status of private schools which discriminate.

125 Cong. Rec. S11980 (daily ed. Sept. 6, 1979).

Congressman Dornan:

> What I will do is say this to the gentleman: It is the 16th of July. The year is almost half over. If the gentleman will help us restrict the IRS for the tenure of this bill, I will be willing to come back with the gentleman and with any caucus in this House and figure out a way to put an end to any schools that we see set up in the next year or after this bill has run out and we have another bill before us that would try to turn race against race in this country and do it under the name of education.
>
> * * *
>
> I have 434 colleagues, including myself, because I think everyone in this House is of good will on this issue, I do not think there is anything that this Congress is prevented from doing in this area if we set our mind to it. I really do not.

125 Cong. Rec. H5980 (daily ed. July 16, 1979).

Congressman Dornan had introduced legislation providing that tax exemptions and the deductibility of contributions to tax exempt organizations not be construed as providing federal subsidy or assistance. In his view, the IRS had predicated its denial of tax exempt status to discriminatory private schools on the assumption that tax exempt status was a form of federal subsidy. See 125 Cong. Rec. H5980 (daily ed., July 16, 1979).

APPENDIX D

Legislators whose remarks indicate that they did not believe the Code empowered the IRS to deny tax exemptions to racially discriminatory schools:

> This regulation is a perfect example of why the framers of the Constitution left all legislative authority with Congress. In trying to accomplish what they perceive to be a desirable social policy, well-meaning bureaucrats have based their regulations on fallacious principles. These IRS regulations assume that a tax exemption is the equivalent of direct Federal assistance. Federal subsidies have always been a vehicle to spread and enforce Federal regulations. But Federal regulations have never been connected to tax exemptions. If we were quietly to accept that tax exemptions are actually Federal aid, we would be tacitly agreeing that the Federal Government owns all wealth, that the Government merely allows us to keep that portion it chooses not to tax away for now. We would be agreeing that the Government may attach regulations to the portion we are "allowed to keep" exemptions [sic] as readily as to the portion it redistributes subsidies [sic]. I do not need to tell you that such logic would be fatal to the fundamental American principles of freedom and private property. No wonder the framers of the Constitution were wise enough to deny the bureaucracy or executive branch any legislative jurisdiction.

125 Cong. Rec. H5981 (daily ed. July 16, 1979)(Congressman Philip M. Crane).

> I support the rationale of the IRS. Their ruling is well-intentioned. Schools guilty of racial discrimination should not only be stripped of their tax exempt status, but should be shut down. But the tax structure is not the proper mechanism to enforce this public policy.

125 Cong. Rec. H5982 (daily ed. July 16, 1979)(Congressman Goldwater).

> This is not to suggest that the goals of the IRS are entirely wrong. Nobody argues that racial discrimination should receive preferred tax status in the United States. However, the IRS should not be making these decisions on the agency's own discretion. Congress should make these decisions.

125 Cong. Rec. H5884 (daily ed. July 13, 1979)(Congressman Grassley).

> Mr. Chairman, the serious questions of integration of our schools; of allowing tax policies, via exemptions, and so forth, [to] be used to affect the conduct of national affairs, private education, separation of church and state, and the many other serious problems involved in this matter, should not be left to or allowed to be the province of the IRS.

125 Cong. Rec. H5885 (daily ed. July 13, 1979)(Congressman Duncan)(statement inserted in the record).

> Further [the sponsors of the amendment to strike the Dornan amendment from the 1980 Appropriations bill] would have us believe that this question is solved by the case of Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), affirmed without opinion by the Supreme Court in that year. I would suggest once again that the situation is not as simple as we are told.
>
> In a 1974 case between Bob Jones University in my State and the IRS, Justice Lewis Powell noted that "the question of whether a segregative private school qualifies under section 501(c)(3) has not received plenary review in this Court, and we do not reach that question today." I repeat, has not. This is 3 years after the case Senator JAVITS and his colleagues cite as dispositive of the issue. Now they may wish that the issue were decided and may know how they want it to be decided, but I submit that it has not been decided. It is not, therefore, up to the IRS to decide it.

125 Cong. Rec. S11837 (daily ed. Sept. 5, 1979)(Senator Thurmond).

> The Senate should be concerned over the assumption by IRS that the Congress has given it the plenary powers which are implicit in its proposed procedures. It can express this concern by defeating the Ribicoff-Javits amendment.
>
> The issue of the tax status of private schools is a matter of far reaching social and educational significance. While the responsibility of the IRS is to enforce the tax laws, it should be allowed to expand its power in this sensitive area only when the legislative mandate and authority is clear and explicit.
>
> The Senate should take the position that we have not vested the IRS with the power which it has attempted to exercise in this area. It is clear that we have not given IRS a blank check to proceed as its uncontrolled discretion dictates to deny the tax exemption status of private and religious schools which the Congress itself has not seen fit to deny.

125 Cong. Rec. S11852 (daily ed. Sept. 5, 1979)(Senator Stennis)(statement inserted in the record).

Legislators whose remarks indicate that they did believe the Code empowered the IRS to make its 1970 policy ruling:

> No one is saying that we should allow tax breaks for segregated schools, but IRS already has significant authority to act, and indeed, has done so in the past, where evidence of discrimination exists.

125 Cong. Rec. H5982 (daily ed. July 16, 1979)(Congressman Miller).

> If I may discuss that for a moment, I think it is because the Congress through the years, and particularly the last couple of decades, has transferred so much legislative power to the agencies of Government that we are now searching for a way to oversee that legislative activity which, basically, is what the IRS has undertaken, and other agencies have, also, and the reason we see this proliferation of legislation on appropriations bills.
>
> It is the only annual mechanism we have that is reasonably reliable, to say, "Agency, you shall not do that. You shall not legislate in that area, because Congress does not want you to legislate in that area."
>
> But we have given them such broad authority to do so, this is the only way we have to try to get back some of that authority.

125 Cong. Rec. S11984 (daily ed., Sept. 6, 1979)(Congressman Schmutt).

> We must not [through enactment of the Dornan amendment] take away the tools of the IRS to enforce the law.

125 Cong. Rec. S11833 (daily ed. Sept. 5, 1979)(Senator Javits).

> The IRS, in this instance, is actually only implementing the law of the land. Now we are attempting by legislation, to bar them from doing so.

125 Cong. Rec. S11835 (daily ed. Sept. 5, 1979)(Senator Metzenbaum).

> For this Senate, in an appropriations bill, to attempt to remove the power of the IRS to carry out its substative duty is misguided and premature. If we

> wish to change the Internal Revenue Code or the Constitution, there are appropriate ways to do so. This amendment [to strike the Dornan amendment from the 1980 Appropriations Act] restores funds which the IRS needs to enforce existing law and the Constitution as interpreted by our courts. That is all the amendment does. It does not endorse the underlying law or court decisions.

125 Cong. Rec. S11851 (daily ed., Sept. 5, 1979)(Senator Levin).

APPENDIX E

Congressman Ashbrook:

> I made it clear at the time that IRS should be able to proceed on the basis of the regulations they had in existence. If they know of discrimination, they can litigate, they can withdraw the tax-exempt status, anything that they could do prior to August 22, 1978, the time when they endeavored to implement these Draconian regulations, could be implemented by IRS. In no way am I trying to impinge on IRS's ability to withdraw the tax-exempt status of any school which might violate the law. That is why the words "August 22, 1978," are in there. . . .

127 Cong. Rec. H5395-96 (daily ed., July 30, 1981).

Congressman Dornan:

> The Dornan amendment to the Treasury appropriations bill prohibited funds for implementation of the original proposed revenue procedure of August 22, 1978, the revision of February 3, 1979, "or parts thereof."

126 Cong. Rec. H7210 (daily ed., Aug. 19, 1980).

APPENDIX F

In a speech preceding the vote on the Ashbrook and Dornan Amendment extensions, Congressman Ashbrook referred to the statement of William B. Ball before the Oversight Subcommittee of the House Ways and Means Committee as "the classic analysis of the legal and constitutional issues involved in this matter," and had the text of Mr. Ball's statement inserted in the record. 126 Cong. Rec. H5200 (daily ed., June 18, 1980). Mr. Ball's statement refutes the statutory and constitutional arguments which have been offered to support the 1970 IRS change of policy, and specifically states that the Internal Revenue Code does not give the Service the authority to deny tax exempt status to private schools which discriminate on the basis of race:

> The Commissioner's point was that a private school, under Section 501(c)(3), is a "charity" -- *i.e.*, a private organization whose purposes are of high social interest to the community. A charitys' [sic] tax exemption, so the argument goes, is conditioned upon its concordance with what, at any particular time, is considered to be "public policy." Since there is a public policy against racial discrimination, a private school practicing racial discrimination may not be tax exempt. A basic error in the Commissioner's (and Judge Leventhal's) argument lies in its failure to reflect the plain language of Section 501(c)(3), which says the organizations are exempt which are:
>
> "* * * organized exclusively for religious, charitable, scientific, testing for public safety, literary, *or* educational purposes * * *" (Emphases [sic] supplied).
>
> By familiar and inevitable construction, the word "or" is to be read after each of the listed categories -- *i.e.*, "religious OR charitable OR scientific * * * (etc.)." The Congress did not, in other words, include "religious" or "educational" under the term "charitable." Had the Congress desired to classify religious purposes as a species of charitable purposes, it would have do [sic] so -- e.g., with phrasing such as:

> "* * * organized and operated exclusively for charitable (including, religious, scientific, testing for public safety, literary, or educational) purposes. * * *"
>
> This the Congress did not do, and it is plain that "religious" purposes cannot be slid under the heading of "charitable" and churches, by that device, made subject to the "public policy" of the moment. Here it is important to add that, as the Supreme Court recognized in Walz, the tax exemption of religious institutions does not depend upon their serving some pragmatic community purpose. Religious purposes are unique, and religious tax exemption closely allied to religious liberty.

126 Cong. Rec. H5200-01 (daily ed. June 18, 1980) (Statement William B. Ball).

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